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NO. 07-257

IN THE

Supreme Court of the United States

CONTINENTAL CARBON CO. AND CHINA SYNTHETIC RUBBER CORP.,

Petitioners,

v.

ACTION MARINE, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should combine aspects of the comparability guidepost articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), with the reprehensibility guidepost that this Court has called the most important indicium of the validity of a punitive damages award?

2. Whether this Court should reverse its settled precedents by adopting a constitutional maximum ratio of punitive to compensatory damages of 1:1 whenever the compensatory award is deemed "substantial," regardless of the reprehensibility of defendants' misconduct, particularly when that misconduct was fraudulent and hidden and was advanced by litigation misconduct that the lower court found prejudiced the capacity to demonstrate the fullest measure of reprehensibility?

3. Whether, in applying the comparable penalties guidepost, a reviewing court must ignore state legislative judgments about the appropriate potential fines for comparably egregious misconduct?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

BRIEF FOR RESPONDENT IN OPPOSITION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 2

I. Petitioners Failed to Advise this Court of the Full Depth of Their Misconduct, the Extent to Which Their Actions Were Compounded by Litigation Misconduct at Trial, or That the Documents They Failed to Produce until after Trial Would Have Supported a Larger Award 2

II. The Lower Courts Are Not Confused About the Relevant Conduct That Goes Into the Reprehensibility Guideline. 13

III. Three *BMW* Guideposts – Reprehensibility, Comparability, and Proportionality – Are and Must Remain Independent 15

IV. There Is No Legal Conflict to Resolve Over the Proper Ratio Between "Substantial" Compensatory Awards and Punitive Damages. 18

V. The Lower Courts' Treatment of Civil Penalties Does Not Require This Court's Intervention. 21

VI. This Case Does Not Present a Vehicle to Define More Clearly This Court's Punitive Damage Jurisprudence. 23

CONCLUSION 27

Appendix A 1

TABLE OF AUTHORITIES

CASES

Action Marine, Inc. v. Continental Carbon Inc., 481 F.3d 1302 (11th Cir. 2007) 15

Asa-Brandt v. ADAM Investor Services, Inc., 344 F.3d 738 (8th Cir. 2003) 17

Bach v. First Union National Bank, 486 F.3d 150 (6th Cir. 2007) 15

Bains LLC v. Arco Products Co., Divison of Atlantic Richfield Co., 405 F.3d 764 (9th Cir. 2005) 15, 17

BMW of North America v. Gore, 517 U.S. 559 (1996) ..... *passim*

CGB Occupational Therapy, Inc. v. RHA Health Services, Inc., ___ F.3d ___, 2007 WL 2390386 (3d Cir. 2007) 15

City of Warner Robins v. Holt, 470 S.E.2d 238 (Ga. App. 1996) 26

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 1, 16, 17, 26

Daka, Inc. v. McCrae, 839 A.2d 682 (D.C. 2003) 27

Day v. Woodworth, 54 U.S. (13 How.) 363 (1851) 16

Diesel Machinery, Inc. v. B.R. Lee Industries, Inc., 418 F.3d 820 (8th Cir. 2005) 15

Goddard v. Farmers Insurance Co. of Oregon, 120 P.3d 1260 (Or. App. 2005) 17

Greenberg v. Paul Revere Life Insurance Co., 91 F. App'x 539 (9th Cir.), *cert. denied*, 542 U.S. 939 (2004) 24

Lance, Inc. v. Ramanauskas, 731 So. 2d 1204 (Ala. 1999) 28

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003) 23, 24

Memphis Community School District v. Stachura, 477 U.S. 299 (1986) 26

Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2d Cir. 2004) 15

National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) 26

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 20

Phillip Morris USA v. Williams, 127 S.Ct. 1057 (2007) 28

Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 422 F.3d 949 (9th Cir. 2005) 18

Rain Bird Corp. v. National Pump Co. LLC, 144 Fed. App'x 373 (Fed. Cir. 2005) 15

Simon v. San Paolo U.S. Holding Co., Inc., 113 P.3d 63 (Cal. 2005) 17

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

Union Pacific Railroad v. Barber, 149 S.W.3d 325 (Ark. 2004) 24

Walker v. Farmers Insurance Exchange, 63 Cal. Rptr. 3d 507 (Cal. Ct. App. 2007) 27

Willow Inn, Inc. v. Public Service Mutual Insurance Co., 399 F.3d 224 (3d Cir. 2005) 23

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VII 1

STATUTES

Indiana Code § 34-51-3-6 (2007) 28

O.C.G.A. §13-6-11 (2006 Supp.) 3

O.C.G.A. §51-12-5 (2000) 3

OTHER AUTHORITIES

Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, *Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001* (Mar. 2005) 27

BRIEF FOR RESPONDENT IN OPPOSITION

Respondents Action Marine, Inc., John Tharpe, Owen Ditchfield, and the City of Columbus, Georgia ("Respondents") respectfully request that this Court deny the petition for writ of certiorari that seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF THE CASE

Petitioners have adopted a strategy of disparaging their underlying liability – liability not contested in any question presented – in order to obtain relief from punitive damages. That ploy should not work. Petitioners purvey the misguided notion that the jury and two reviewing courts held them liable despite their use of "best available pollution-control technology," despite their having "identified and remedied the causes of emissions when they occurred," and despite their having caused only "tiny amounts" of pollution deposits in all but one instance. Pet. at 3-6. That is not what the jury found and its findings are not subject to reexamination in this Court. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439 n.12 (2001); U.S. Const. amend. VII.

Contrary to the tale Petitioners spin, this is a story of companies that knew that they had inadequately guarded against harmful emissions. They denied that pollution affecting Respondents and others came from their plant, despite knowing otherwise. They chose not to remediate because remediation would lessen – not eliminate, but lessen – profits. They intentionally harmed people. They hid documents that revealed their extensive knowledge of problems and then, from the filing of this case through trial and beyond, engaged in litigation misconduct for which they were separately sanctioned.

Petitioners' portrayal of the record, which Respondents describe in Part I (reasons for denying certiorari), continues the pattern of denial and obfuscation that has characterized their original misconduct. Their unclean hands should not be washed by this Court.

REASONS FOR DENYING THE PETITION

I. Petitioners Failed to Advise this Court of the Full Depth of Their Misconduct, the Extent to Which Their Actions Were Compounded by Litigation Misconduct at Trial, or That the Documents They Failed to Produce until after Trial Would Have Supported a Larger Award

Federal courts do not lightly conclude that particular acts of misconduct fall at the extreme end of the reprehensibility scale. Judges see a broad range of misconduct, civil and criminal, that makes them more likely to be blasé rather than shocked by new instances of egregious misconduct.

Accordingly, when both the District Court and the Court of Appeals find that a defendant engaged in a "pattern of intentional misconduct . . . leading to repeated damage to Plaintiffs' properties," that the defendant responded to complaints over a five-year period with subterfuge, and that the defendant's misconduct was "undeterred by both the prospect and reality of litigation," Pet. App. at 24a-25a, those courts' determinations should be considered earnestly made, and should be credited as reflecting a troubling record. The courts' statements ought to be treated as more credible than the disparagements of losing parties, who conveniently elide the parts of the record that are at odds with the tale they seek to concoct. In fact, reading Petitioners' narrative of the record, one would be hard-pressed to understand why the courts found any

misconduct at all, let alone the "exceedingly reprehensible" actions and inactions the Eleventh Circuit concluded had taken place. Pet. App. at 25a.

The massive trial record establishes a strategy of denial, deception, and subterfuge that permeated Petitioners' treatment of the Respondents and that continued through the trial and beyond. No relief from the jury's proper verdict, the trial court's affirmation of that verdict, and the careful and searching review by the Eleventh Circuit that confirmed its propriety should lie in this Court.

Petitioners' disregard of the record begins with factual findings, specially made by the jury, and not challenged here: that "clear and convincing evidence" demonstrated that Petitioners' harmful acts "showed willful misconduct, malice, fraud, oppression" or conscious indifference to the consequences of its actions, Jury Qs 4, 9, 14, 19 (a finding necessary, under governing Georgia law, to permit liability for punitive damages, O.C.G.A. §51-12-5.1(b) (2000)); that Petitioners acted in bad faith, Jury Qs 5, 10, 15, 20 (a finding prerequisite to an award of attorney fees under Georgia law, O.C.G.A. §13-6-11 (2006 Supp.)); and that Petitioners acted with "specific intent to harm the plaintiffs." Supp. Verdict Form Q 22 (a prerequisite to liability for punitive damages greater than $250,000, made in a supplemental trial under Georgia's bifurcated system of trying punitive damages claims, O.C.G.A. §51-12-5.1(f), (g)(2000)).

Especially problematic to Petitioners, who argue about the state of the record, is that the trial court, in sanctioning them post-appeal for their contemptuous abuse of discovery, found that their bad faith "prejudiced [Respondents] in their presentation of evidence to the jury, *and on appeal.*" Sanctions Op. at *19, App. A, *infra*,

35a[1] (emphasis added). Petitioners withheld evidence germane to assessing the reprehensibility of their conduct and evidence directly related to misconduct they continue to soft-peddle. *See, e.g.*, Sanctions Op. at *5-6, App. A, *infra*, 10a-11a (information related to "knowledge of the discharge of carbon black dust on the surrounding community," the causes of the discharges, remedies for the discharges, delays in implementing remedies, and the costs involved in correcting operational and environmental problems compared to delays in making the corrections); *compare, e.g.*, Pet. at 4 ("Nevertheless, *uncontradicted evidence*[2] showed that [Petitioners] identified and remedied the causes of emissions when they occurred") (emphasis supplied). Perhaps anticipating this very scenario, the lower court, noting Petitioners' intent to gain advantage on appeal, noted that their "strategy to withhold evidence until the post-trial stages would enure to them great benefit." Sanctions Op. at *15, App. A, *infra*, 27a.

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[1] The Sanctions Opinion, *Action Marine, Inc. v. Continental Carbon, Inc.*, __ F.R.D. __, 2007 WL 2301897 (M.D. Ala. Aug. 9, 2007), is reprinted in Appendix A, *infra*, 1a.

[2] This remarkable misrepresentation of the record was contradicted by evidence that discharges often occurred at night, when they could not be visibly detected. The capacity of the bag filters designed to capture emissions and prevent their discharge was known to be inadequate and decisions were made not to spend the money that would have addressed that inadequacy. Petitioners investigated the complaints of discharge, concluded that they were valid, and Petitioner still denied that they were the cause, continuing to do business just as before. (R. 1368-70, 1692; Dkt. 268, Ex. A, pp. 5-20, 413, 425; Dkt. 268, Ex. C, pp. 19, 126-27, 169, 291-92, 369, 410-11, 414-15, 463, 628; PX 1.3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 17, 23, 43, and 172-6).

Petitioners emphasize the fact that "Several of the properties for which the City sought recovery tested negative for carbon black," and that the City "recovered damages to remediate these properties." Pet. at 5-6. Petitioners' suggestion of injustice is supported by only one thread in a strong cloth of evidence.

Respondents conducted random sampling during the life of this case. E.g., PX 104B-8, 9, 10, 11, 13, 14, 18, 19, 21, 22, 27-30, 34, 35, 42-45, 60-62, 65, 67, 69-71, 73, 74. [NOTE: These are all page numbers in 1 composite exhibit, 104B.] One sample collected at the Rigdon Park baseball field and one at Memorial Stadium did not yield positive laboratory results for carbon black (PX 104-B-21 and 68); Respondents did not collect a sample from the Whopper softball field. (R. 1447). This is the thread on which Petitioners' suggestion hangs.

But the Rigdon Park ball field lies directly between the Rigdon Park pool and playground (same property). (R. 720, 726, 1233). Both the pool and playground yielded positive samples. (PX 104-B-13, 69, 70, 71; PX 109-75). Similarly, the Memorial Stadium and Whopper softball field facilities share a parking lot with the Civic Center and Golden Park. (R. 1009-10, 1219-20, 1427,1465). Petitioners and Respondents both collected positive samples at the Civic Center and Golden Park and additional scientific evidence in the form of air-modeling data placed each facility in the fallout area. (PX 61; PX 104-B-11, 19, 65, 67; PX 144; R. 369-73, 374-75, 877-90, 928, 1353, 1373, 1785-86, 1816, 1821-22).[3] Abundant

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[3] Reviewing the laboratory reports, photographs, and data generated by Respondents' expert, Petitioners' own expert conceded at trial it was "fine work." (R. 1824-1826). While Respondents introduced expert testimony and evidence relating to air emission modeling, Petitioners offered none. (PX 144; R. 877-78, 891-92, 909).

evidence supports the findings Petitioners decry but do not challenge.

Similarly, Petitioners suggest that they "identified and remedied the causes of emissions when they occurred," Pet. at 4; "built new plant facilities" that "pretty much solved" problems, Pet. at 4; and did all this "before judgment was entered." Pet. at 13, n.4.

Although Petitioners certainly identified equipment and operational problems that were causing carbon black emissions, they did not remedy any of those problems or replace any equipment until after this case was filed. Even then, the bulk of their equipment problems were not addressed until after the jury returned its verdict and after Petitioners were confronted with the prospect of an injunction requiring the work. In delaying, corporate decisionmakers ignored the pleas of plant managers to spend the money necessary to avoid the harm that all of them knew was occurring, betting the health of the community against their corporate bottom line.[4]

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[4] Petitioners assert that "there was no evidence that the carbon black emissions posed a health risk to the community," Pet. at 5 n.3, but do not challenge the findings otherwise that are well-supported in the record. According to Petitioners' own Material Data Safety Sheets, the Occupational Safety and Health Administration (OSHA) classifies carbon black as "hazardous under OSHA regulations"; the U.S. National Institute on Occupational Safety and Health has adopted a air concentration limit for exposure to polyaromatic hydrocarbons (PAHs) in carbon blacks with specified PAH levels, "[a]s some PAHs are possible human carcinogens"; and IARC, the International Agency for Research on Cancer, has classified both carbon black and carbon black extracts as "possibly carcinogenic to humans." (PX 32-8, 32-17).

The Phenix City facility has been in operation for over twenty years. (Dkt. 175-1). The original production unit (Unit One) was constructed in 1968. (PX29). In 1998, by adding a second production unit (Unit Two), Petitioners doubled annual carbon black production capacity to 200 million pounds. (Dkt. 268, Exhibit C, p. 2) (R. 74, 224). Even before Petitioners doubled production capacity, City of Columbus officials and local residents had complained to Petitioners about carbon black pollution and damages. (PX2). Although Petitioners publicly denied the problems, and even lied to Respondent Action Marine by advising Respondent that samples taken from Respondent's property did not contain carbon black, Petitioners admitted internally that Unit One was in deplorable condition when the plant expansion began. (R. 291-292, 322). Plant manager Barry Nicks stated in an e-mail: *"Damn those who let it get in such a disgraceful state."* (R. 322; PX3) (emphasis added).

Within one year after the additional operating unit came on line Petitioners were aware that their facility was polluting the environment and damaging properties. (PX1, 2, 5, 6, 7, 8, 11, 12, 19, 22, 153; R. 258; Dkt. 268, Exhibit A, p.14; Dkt. 268, Exhibit C, p. 2 (Continental Carbon Co. (hereinafter "CCC") president, Kim Pan, admitting knowing since 1999 of bag filter defects)). In various internal documents, Petitioners exhibited knowledge that reparable manufacturing defects and deficiencies at their facility were causing harm. (PX 5; R. 188, 369, 390-91, 399-400, 412-13, 415, 425, 426, 459-60, 463, 473). Petitioners specifically acknowledged that repeated bag filter failures and over-pressurization of their production system were harming the environment and the Respondents. (Dkt. 268, Exhibit A, pp. 8-11, 14).

One undated internal Request for Expenditure ("RFE"), going from the local plant to corporate

decisionmakers, detailed the history of bag filter failures and carbon black releases:

> *Phenix City has experienced operational problems with the bag filter system since Unit 2 was commissioned in 1999.* The filter media fails . . . *causing* unnecessary unit down time, operating cost, and *carbon black release into the environment.* . . . The engineering analysis points to basic over-loading of the bag filter system (commonly referred to as: high air/cloth ratio).

(PX9) (emphases added). In this same RFE, Petitioners attributed this lawsuit to bag filter failures, admitted they were harming the environment, and evaluated civil liability in this case:

> *The frequent bag filter failure* has been a constant drain on Phenix City resources, both economically, and in human capital. . . . *Most importantly, the damage to the environment and public perception to this plant operation has a serious implication on this facility's future.* The ongoing civil class action law suit at this location can be directly attributed, in part, by this problematic bag filter system. *We must resolve this bag filter leakage problem or the existence of the plant will be in serious jeopardy.* Total liability for the civil suit can easily exceed $500K.

(PX9) (emphases added).

In one February 29, 2000 e-mail, petitioners noted:

> This recent round of problems with Unit 2 bag filters gives us enough history to know that we cannot continue via the current path. *We know that there is an inherent design problem in the filters,* and are currently suffering from another round.

(PX4) (emphasis added).

In a related February 29, 2000 e-mail to Juan Rodriguez (Petitioners' corporate trial representative), plant-level operatives noted, *"This plant is on the verge of shutting down U2 due to a lack of bags to protect the environment."* (PX4)(emphasis added).

Despite knowledge of manufacturing deficiencies and resulting pollution, corporate management refused expenditures because the "payback" (financial return) for necessary expenditures could not be recovered quickly enough. (R. 127; Dkt. 268, Exhibit C, pp. 1-2 following p. 24). In an e-mail dated October 10, 2001, employees debated whether CCC could afford *not* to take action to remedy bag filter defects. CCC plant manager Barry Nicks stated in one e-mail:

> There is something much more critical in this RFE than capital recovery. It is the avoidance of a Civil Law Suit - Class Action. *If we do not get this bagfilter under control so that is not constantly operating with some small leak up to an intolerable leak, then this plant*

> *can become just like Baytown ECI.*[5] *The payback in such a case may be really fast.*

(PX5) (emphasis added).

Rather than make repairs in 1999, 2000, or 2001, Petitioners continued to disregard environmental concerns and the well-being of Respondents. In a round of e-mails on January 17, 2002 (almost one year after the case was filed), CCC Vice President of Operations Juan Rodriguez informed Phenix City plant manager, Barry Nicks, that the company was rejecting the plant's request to fix the Unit 2 bagfilter defects, not because the expenditure would render the plant unprofitable, but because it would not satisfy the defendants' corporate policy of recouping all of the project costs within 2 to 3 years. (R. 126-27; PX13).

Mr. Nicks responded by sending an e-mail to CCC corporate engineer N.L. Lee (which he copied to Rodriguez):

> The bottom line will be that U2 will have a higher filter bag maintenance cost, . . . and (most frightening) the possibility of liability payments to the community (not budgeted). Then there is the potential that the legal side will become so visible and costly, that

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5 The Baytown, Texas ECI facility manufactures carbon black and is a direct competitor of Petitioners. (R. 159). Nicks' purpose in mentioning the Baytown plant was to scare his corporate superiors into thinking that if they did not correct their environmental problems at the Phenix City plant, they would be put out of business. (R. 414 & 415).

> the plant itself will be forced to close due to political pressures. Since the plant generated in excess of $2.0MM Gross Operating Profit for the Company's revenue from its miserable operation during the bad economy of 2001, surely there is value in keeping it operating in future years with sold out parameters, rather than having a closed chemical plant liability.
>
> From my point of view . . . how can we afford NOT TO correct the problem?"

(PX13) (emphasis added). The Unit 2 defects were not resolved before trial.

Petitioners suggest that emissions from the plant were occasional, unavoidable, reported, and promptly corrected. Randy Wangle is the former maintenance supervisor of the plant. (R1330). According to Mr. Wangle, stopping production to repair a leak was a last resort. (R1370).

Wangle testified that carbon black emissions into the environment were visible at the plant. (R1355). Wangle knew about the "chronic bag filter problems, they would bust, the air to cloth was too high," (R1359), and that filter bag ruptures released carbon black into the environment. (R1360-61).

Mr. Wangle described purposeful subterfuge to evade responsibility: carbon black leaks at night were not reported to regulators because they could not be seen by third parties. (R1368). With regulatory authority eluded, the plant ran higher production levels at night. (R1692).

Maintenance employees would not begin looking for "leaks" unless alarms kept going off "frequently within an hour's time." (R1370). Leak detection devices, called triboguards, would be cleaned and restarted without repairing the cause of the leak. (R1370). Frequently carbon black leaks at night were not repaired until morning. (R1369). Petitioners hid their misconduct under cover of night.

Mr. Wangle testified that corporate managers did not have real concern about the carbon black pollution and saw it as "more of a joke." (R. 1353-54). Management *never* stressed that safety, health, and the environment be put first, even though it "knew" that carbon black was "getting out into the environment." (R1355).

Petitioners assert that they used "best available control technology." Pet. at 3. But, in the July 5, 2005 injunctive relief order (Dkt. 295-1), the Court directed Petitioners to make capital improvements and repairs to their operating equipment. (Dkt. 295-2). The Court's Order also imposed a strict timetable to carry out upgrades, and included a schedule of dates for the Petitioners to submit progress reports. (Dkt. 295-1). Had Petitioners taken steps to make these improvements before the filing of this lawsuit or during the three years between its filing and trial, then they might well be in a position to argue their plant used best available control technology. But, the record clearly reflects that because Petitioners made no such efforts, the Court was required nearly a year after the jury's verdict to force Petitioners to take action. (R. 295-1).[6]

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[6] Petitioners' claim regarding their use of "best available control technology" has varied with the perceived exigencies of this litigation. At trial, Petitioners found it advantageous to claim they had used such technology (R. 32, 34) (opening statement), a claim implicitly rejected by the jury. But later,

Given that (1) Petitioners have not given an accurate account of the record, (2) the record reveals a company that resisted addressing a known hazard and instead adopted a pattern of subterfuge, and (3) Petitioners' dishonesty continued during the course of this litigation and beyond trial, resulting in imposition of sanctions against Petitioners post-appeal, which Petitioners have not challenged, this case provides a poor vehicle for review of any conflicts that might exist within the circuits over punitive damages.

II. The Lower Courts Are Not Confused About the Relevant Conduct That Goes Into the Reprehensibility Guideline.

Though they present no question for this Court to decide on this subject, Petitioners assert that the lower courts are in conflict regarding whether they should consider "the full spectrum of punishable conduct" when ascertaining "the degree of reprehensibility." Pet. at 9. In doing so, they ignore the State's interest in defining the misconduct deemed worthy of punitive damages. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) ("A basic principle of Federalism is that each State may make its own reasoned judgment about what

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using documents withheld from Respondents during pre-trial discovery, Petitioners offered evidence they had made repairs to the operating units (and, implicitly, to their "best available control technology"), "for the *purposes of staving off the injunctive relief* sought by [Respondents] post-trial" – part of the litigation misconduct the District Court found sanctionable post-appeal. Sanctions Op. *at* 13, App. A, *infra*, 24a (emphasis in original). Now, despite having concededly been ordered (without objection) "to replace or repair substantial parts of the Unit I bagfilter system," Pet. at 6; Pet. App. at 48a, Petitioners again claim to have used "best available control technology" in urging review of the Eleventh Circuit's findings on reprehensibility. *See id.* at 3 & 13 n.4.

conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." (citation omitted)). Moreover, they also confound two rightly separate analyses: ascertaining the degree of reprehensibility, and ascertaining appropriate damages once reprehensibility has been decided.

This Court has provided clear guidance on the question of how to determine whether the degree of reprehensibility supports the amount of punitive damages assessed. The lower courts – including the courts singled out by Petitioners – have exhibited no trouble applying it.

In *State Farm*, this Court counseled:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

538 U.S. at 419.

The circuits have recognized the importance of these aggravating factors in assessing the reprehensibility determination, and no conflict exists between the circuits. *See, e.g., Action Marine, Inc. v.*

Continental Carbon Inc., 481 F.3d 1302, 1318-19 (11th Cir. 2007); *CGB Occupational Therapy, Inc. v. RHA Health Serv., Inc.*, ___ F.3d ___, 2007 WL 2390386 at *3 (3d Cir. 2007); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 153 (6th Cir. 2007); *Diesel Mach., Inc. v. B.R. Lee Indust., Inc.*, 418 F.3d 820, 839 (8th Cir. 2005); *Bains LLC v. Arco Prod. Co., Div. of Atlantic Richfield Co.*, 405 F.3d 764, 775 (9th Cir. 2005); *Rain Bird Corp. v. National Pump Co. LLC*, 144 Fed. App'x 373, 376 (Fed. Cir. 2005); and *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63 (2d Cir. 2004). And, the Eleventh Circuit properly applied these factors in making its reprehensibility determination in this case. Pet. App. at 23a-26a.

III. Three *BMW* Guideposts – Reprehensibility, Comparability, and Proportionality – Are and Must Remain Independent

BMW establishes three independent guideposts – reprehensibility, proportionality, and comparability. Petitioners suggest that a comparative element, identical to that utilized in considering the third *BMW* guidepost (comparability), be added to the first *BMW* guidepost (reprehensibility) for purposes of determining the proportionality of the punishment to the offense, the essence of the second *BMW* guidepost. Such an approach collapses all three *BMW* guideposts into a single one in a manner that detracts from the centrality of reprehensibility as the "most important indicium of the reasonableness of a punitive damage award," and double counts the importance of the other two guideposts. *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996).

Equally important, it would transform the historically validated test that requires that punitive damages match the "'enormity of the offense'", *see id* (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)), into a comparison that would burden the existing process with evidence of the facts in other cases in order

to make meaningful comparisons. Punitive damages reflect the jury's "moral condemnation" of the misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Necessarily, the determination of the level of appropriate moral outrage any given fact pattern entails is more properly a jury question. *Compare id.* at 437 n.11 (recognizing the jury's primacy in fact-sensitive punitive damage amount determinations) *with id.* at 440 (recognizing trial court's greater institutional competence in evaluating evidence material to the reprehensibility guidepost). Thus, it would be the function of the jury to make the type of novel record comparison Petitioners propose, massively complicating – and changing the historical understanding of – the punitive damage phase of the trial.

Certainly, in applying those considerations in *State Farm*, this Court did not engage in the kind of analysis Petitioners argue is constitutionally required: "compar[ing] the misconduct at issue *to the conduct in other punitive damages cases.*" Pet. at 11 (emphasis added). *See State Farm*, 538 U.S. at 419. The reason is simple: deciding whether a given case falls into a given category does not require knowledge of whether any other case falls into that category. The cases Petitioners cite apply this test without consternation and do not engage in a comparative analysis in order to assess degree of reprehensibility. *See Bains v. Arco Prod. Co.*, 405 F.3d 764, 775 (9th Cir. 2005); *Asa-Brandt v. ADAM Investor Serv., Inc.*, 344 F.3d 738, 746-47 (8th Cir. 2003); *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 75-76 (Cal. 2005); *Goddard v. Farmers Ins. Co. of Or.*, 120 P.3d 1260, 1281-82 (Or. App. 2005).

Some of these cases do use a comparative analysis, but for a separate purpose, one recognized separately in this Court's decisions in *BMW* and *State Farm*: assessing the amount of damages appropriate once a degree of

reprehensibility is ascertained. For example, the court in *Planned Parenthood of Columbia/Willamette, Inc v. American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005), Pet. at 12, extensively discusses potentially similar cases for purposes of ascertaining the amount of damages, *id.* at 954-57, but does not engage in a similar discussion regarding degree of reprehensibility. *Id.* at 958-60.

Petitioners acknowledge that the court below considered it appropriate to engage in comparative analysis to determine the amount of an award. Pet. at 10 (quoting the court below: "'the fact that an award is significantly larger than an award in apparently similar circumstances'" could affect the analysis of how large an award should be). Petitioners fail to note, however, that the lower court found that none of the instances Petitioners had proposed for comparison were, in fact, similar to the case at hand. Pet. App. at 26a. Petitioners do not challenge that finding with regard to the cases it put before the lower court. The question of whether similarly situated parties were treated differently is not raised by this case.

Petitioners characterize the conduct for which they are being punished as "the failure to do more to prevent periodic releases of carbon black during the manufacturing process." Pet. at 11-12. *See also* Pet. at 12 ("periodic failure to prevent carbon black releases.") The lower courts characterized Petitioners' conduct differently and eloquently.

The District Court noted, "[t]he evidence before the jury established a pattern of intentional conduct on the part of [Petitioners] leading to repeated" trespasses. Pet. App. at 43a-44a. "This misconduct included bolstering profits rather than remedying known defects . . . and a less than honest approach to their dealings" with injured parties. Pet. App. at 44a.

The Court of Appeals, affirming, said:

> With respect to the pattern and duration of Continental's intentional misconduct, the events at issue spanned more than five years, and Continental continued its course of action and inaction undeterred by both the prospect and reality of litigation. In addition, the harm inflicted cannot adequately be characterized as solely economic. Continental's actions resulted in the destruction of a once successful business and interfered with the use and enjoyment of municipal property. . . .
>
> The evidence also demonstrated Continental's willingness to elude accountability. . . .
>
> Finally, we note that Continental's actions likely harmed a great number of people and businesses who are not parties to this litigation.

Pet. App. at 25a-26a.

There is little wonder that the cases Petitioners considered worthy of comparison were properly rejected by the lower courts as inadequate to cover the same level of reprehensibility as occurred here. The only proper conclusion is that the degree of reprehensibility of Petitioners' conduct was properly and accurately ascertained.

IV. There Is No Legal Conflict to Resolve Over the Proper Ratio Between "Substantial"

Compensatory Awards and Punitive Damages.

Petitioners claim that there is a conflict among the federal circuits regarding the maximum ratio permitted when the compensatory damages awarded are "substantial." Pet. at 14-18. To assert that novel proposition, Petitioners claim that this Court has established a 1:1 ratio ceiling as a "constitutional maximum," Pet. at 18, relying on language in *State Farm*, which cannot be viewed as creating the categorical limit Petitioners assert it does. 538 U.S. at 425.

In advancing this unjustified claim, Petitioners manufacture a mathematical bright-line strait-jacket out of precedential cloth that this Court has repeatedly, categorically, and wisely declared cannot be woven together – and so states in the very case Petitioners assert held otherwise. *See State Farm*, 538 U.S. at 424-25 ("[w]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline *again* to impose a bright-line ratio which a punitive damages award cannot exceed.") (emphasis added; citations omitted). *See also BMW*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.").

In fact, the same paragraph in *State Farm* that suggested a single-digit ratio was "perhaps" appropriate when the compensatory award was "substantial" reiterated that "there are no rigid benchmarks that a punitive damages award may not surpass" and that "[t]he precise award in any case, of course, must be based upon

the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

For that reason, it is entirely improper for Petitioners, in seeking to manufacture an artificial conflict, to take the few cases across the circuits that have both substantial compensatory damage awards as well as punitive damages and compare whether they fall uniformly within a 1:1 ratio, as Petitioners suggest. Such an examination utterly ignores the fact-sensitive nature of the type of review this Court has authorized. Moreover, it elevates "ratio" into the conclusive measure of "gross excessiveness," undermines the preeminence that this Court has accorded to the reprehensibility guidepost, and turns judicial review of punitive damage awards into nothing more than an exercise in elementary-school mathematics.

Even if this Court were inclined to speak further about mandatory ratios, granting review in this case, based on this record, would only encourage other parties to hide responsibility through falsehoods and obfuscation, to compound their egregious behavior through litigation misconduct, and to continue such behavior with impunity, knowing that, if caught, their punitive liability is capped at whatever their compensatory liability is. Simply put, they would have no incentive to stop misconduct that warrants punishment.[7]

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[7] Petitioners' coldly calculated choice not to repair, before verdict, the known problems that directly caused Respondents' damages provides a prime illustration. Petitioner Continental Carbon's president testified repairs were not authorized to Unit One because the Petitioners could earn more than a 582% return on that investment, if made elsewhere. (Dkt. 268, Ex. C, pp. 1-2 following p. 24). Imposition of a maximum ratio of punitive to compensatory damages of 1:1, thereby capping

V. The Lower Courts' Treatment of Civil Penalties Does Not Require This Court's Intervention.

This Court has given the third *BMW* guidepost, comparability, a lesser level of importance than it has accorded to the other guideposts. In *State Farm*, it found the most relevant civil penalty to be $10,000 and suggested that an appropriate punitive damage award would be on the order of $1 million. *State Farm*, 538 U.S. at 428. Petitioners seek to enhance the relevance of this guidepost in their third question presented, through which they seek to require courts to determine how realistic it is that a penalty be assessed before using it for comparative purposes.

Petitioners' initial premise guiding their argument is erroneous. In *State Farm*, this Court did not hold that it was wrong to consider the possible loss of a license, disgorgement of profits, or even possible imprisonment, as Petitioners contend. Pet. at 19. Instead, this Court found the Utah Supreme Court's use of those considerations was irrevocably tainted by their dependence on evidence of a "broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct" that this Court held was improperly considered in arriving at the award. *State Farm*, 538 U.S. at 428. Thus, this Court has held not that such considerations are improper, but instead that they must be limited to the misconduct properly before the jury.

Because there is no mandate to avoid consideration of other relevant potential sanctions, courts

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punitive liability at whatever the amount of compensatory liability, would not even disgorge Petitioners of the unjust gain they realized from diverting the needed investment in repairs to Unit One to other, more lucrative returns.

are not divided on the question, despite Petitioners' claim that they are. *See* Pet. at 19. Much like Petitioners' skewed characterization of this Court's statement in *State Farm*, Petitioners have given short shrift to what courts have actually done in response. A faithful reading of the cases reveals no conflict that should engage this Court's attention.

For example, Petitioners cite *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237-38 (3d Cir. 2005), which used as a comparative factor the civil penalty that the "parties agree[d was] most applicable," a fine under the state's unfair insurance practices law. It is difficult to accuse a court of using an unrealistic and speculative civil penalty when it is the product of agreement between the parties.

Petitioners also cite *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003), where the court indicated that the parties, unhelpfully, had failed to "present[] evidence concerning the regulatory or criminal penalties to which the defendant exposed itself by deliberately exposing its customers to a substantial risk of being bitten by bedbugs." Even so, the court took "judicial notice that deliberate exposure of hotel guests to the health risks created by insect infestations exposes the hotel's owner to sanctions under Illinois and Chicago law that in the aggregate are comparable in severity to the punitive damage award in this case." *Id.* Rather than rely solely on the possibility that the Defendant could have lost its license, as Petitioners suggest, the court related the amount of punitive damage to the fine and cited a case in which a corporate official was actually imprisoned for violation of the applicable law. *Id.* Given the realism in which the Seventh Circuit grounded its decision, it can hardly be described as rampantly speculative, contrary to Petitioners' portrayal.

Petitioners also cite the unpublished decision in *Greenberg v. Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir.), *cert. denied*, 542 U.S. 939 (2004), which engaged in no analysis and has no precedential value. Finally, Petitioners decry a state supreme court's conclusion that, if enforced, federal daily fines for a railroad's 450-day violation of a clear-sight rule, which resulted in a death, totaled $9.9 million and that the state's separate sanctions of the misfeasance that would add $186,000 per year in fines, were not so out of line with a $25 million award as to require its reduction. *Union Pac. R.R. v. Barber*, 149 S.W.3d 325, 350 (Ark. 2004). None of these decisions demonstrate a flaunting of this Court's instructions, Petitioners' suggestion notwithstanding.

VI. This Case Does Not Present a Vehicle to Define More Clearly This Court's Punitive Damage Jurisprudence.

Separate and apart from the "unclean hands" Petitioners bring to this case and the legal issues that they raise, Petitioners' request for clarification of this Court's punitive damages jurisprudence, Pet. at 23, rings hollow in light of what Petitioners assert those cases hold.

First, Petitioners complain that there is a "tendency [among] many courts to apply the [*BMW*] guideposts mechanically." Pet. at 23. Yet, Petitioners' preferred solution is to establish a far more mechanical ratio of precisely the type this Court has resisted, one that would operate without consideration of the behavior that merited the punitive damages. Contrary to Petitioners' entreaties, the Due Process Clause contains no numerical limits and instead requires the type of careful weighing of evidence that courts have uniformly endeavored to employ in evaluating the propriety of punitive awards. *See State Farm*, 538 U.S. at 425 (the

"precise award . . . must be based on facts and circumstances" of the case).

Second, Petitioners claim that defendants are being punished even if their culpability, after having paid compensatory damages, is not sufficiently reprehensible to merit punitive damages.[8] Pet. at 23.[9] Yet, as examples

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[8] Petitioners assert that an award of attorneys fees in the amount of $1,294,000 has "punitive and deterrent effects" that should lower the punitive damages. Pet. at 17. As a matter of state law, that award is compensatory. Pet. App. 22a-28a. A grant of certiorari in this case would require resolution of whether that independent finding of state law could be ignored in applying the *BMW/State Farm* factors.

[9] Petitioners suggest in their second Question Presented that (1) "substantial" compensatory damages, "significant" attorney's fees, and/or "extensive" injunctive relief should confine permissible punitive damages to no more than a 1:1 ratio to such other relief, and (2) courts conflict in their treatment of fees as a factor to reduce, rather than increase, the maximum permissible punitive award. Pet. at i, 17-18.

But, the first suggestion ignores the distinct and well-settled differences in the primary purposes of each such type of relief. Whereas punitive damages seek to punish a defendant's unlawful conduct and to deter repetition of similar behavior by others, *e.g.*, *State Farm*, 538 U.S. at 416; *Cooper Indus.*, 532 U.S. at 432; *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 n.9 (1986), compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *State Farm*, 538 U.S. at 416 (quoting *Cooper Indust.*, 532 U.S. at 432; *see also, e.g., Memphis Cmty Sch. Dist.*, 477 U.S. at 306-07. Similarly, attorneys fees, in those limited circumstances under which such awards are authorized here, are awarded to compensate an injured party to avoid further injury "by the cost incurred as a result of the necessity of seeking legal redress for [the party's] legitimate grievances." *City of Warner Robins v. Holt*, 470 S.E.2d 238, 240 (Ga. App. 1996) (*see, e.g., Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.22

of their claim that the majority of courts cross the constitutional line on this question, they rely entirely on cases where the ratio is merely more than 1:1, with the majority of those cases still falling well within a single-digit ratio and having been decided before 2003, the year of this Court's decision in *State Farm*. Pet. at 27 n.12.

Petitioners make no attempt to evaluate the factual circumstances of the misconduct in the cases they cite, and they ignore the vast empirical evidence that demonstrates that few punitive damage awards reach eye-popping amounts. *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, *Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001*, NCJ 208445, at 8 tbl. 9 (Mar. 2005) (finding, based on the most recent available statistics, that the median inflation-adjusted punitive award was only $50,000 in 2001, compared with $63,000 in 1992). Their presentation, calling the majority of courts roguish in their flaunting of this Court's holdings, is wrong, fails to consider the record before those courts, and cannot establish an issue worthy of a grant of certiorari.

(1985)). Injunctive relief likewise is not imposed as punishment, but instead lies only where there is no adequate remedy in damages at law.

Petitioners' second suggestion founders on an illusory and undeveloped "conflict" assertedly resting upon only one state supreme court decision (in dictum) and one intermediate appellate court decision in which the fee award were, respectively, less than 2 percent of the size of the punitive award and less than 10 percent of the size of the punitive award. Pet. at 17-18 (citing *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. 2003), and *Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507 (Cal. Ct. App. 2007). The absence of clear conflict and, even if such conflict were present, the immature stage of such conflict reflect a "dispute" insufficiently developed to warrant exercise of this Court's supervisory discretion.

Third, Petitioners resolutely ignore what this Court has found to be the first consideration in any punitive damages evaluation – the States' legitimate interest in punishing unlawful conduct and deterring its repetition. *See Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1062 (2007); *BMW*, 517 U.S. 559, 568 (1996) ("Federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve."). States have different interests that are pursued differently with respect to punitive damages. *Id.* ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."). For example, in Alabama punitive damages substitute for the role that other states assign to compensatory damages in wrongful death actions. *See Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1218 (Ala. 1999). In some states, the State's interest is expressed by allocating significant portions of a punitive damage award to public purposes. *See, e.g.*, Ind. Code § 34-51-3-6 (75 percent). In Georgia, whose law governed this award, punitive damages are capped at $250,000 per plaintiff, unless there is a finding of a specific intent to cause harm, as was found here.[10] *See* O.C.G.A § 51-12-5.1(f), (g).

Such differences in State treatment of punitive damages make the purely ratio-based comparison advocated by Petitioners at odds with the federalist system adopted by our Constitution. It would complicate, rather than make more predictable, the determination and review of punitive damages, serving no useful practical purpose, let alone any proper constitutional one. To present a proper case for review by this Court, a

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[10] Petitioners do not contest the jury's finding on this point in their petition.

petitioner should bear the burden of proving, based on an accurate rendition of the record, that a lower award would be sufficient to vindicate the particular State's defined interest in a manner that the lower courts failed to appreciate. Pure numerical comparisons can never substitute for such a showing – and no attempt to make the proper, necessary showing is contained in Petitioners' application to this Court. It must therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 26, 2007 *Counsel for Respondents*

APPENDIX

Appendix A

United States District Court
M.D. Alabama, Eastern Division.

ACTION MARINE, INC., et al., Plaintiffs,
v.
CONTINENTALCARBON, INC., et al., Defendants.

No. 3:01-cv-994-MEF[1]
Aug. 9, 2007.

Daniel W. Lee, La Grange, GA, David B. Byrne, III, Jere L. Beasley, Rhon E. Jones, Beasley Allen Crown Methvin Portis & Miles PC, Montgomery, AL, Edward Reed Jackson, James C. Brakefield, Tweedy, Jackson, Beech & Fikes, Jasper, AL, Jeffrey Edwin Friedman, Friedman Leak Dazzio Zulanas & Bowling, PC, Birmingham, AL, for Plaintiffs.

Anthony Ching, Rancho Cucamonga, CA, Clifford Carrington Brady, Brady Radcliff & Brown, LLP, Mobile, AL, Evan Mark Tager, Mayer Brown Rowe & Maw LLP, Washington, DC, H. Thomas Wells, Jr., Jarred O. Taylor, II, Maynard, Cooper & Gale, P.C., Birmingham, AL, J. Brett Busby, Mayer Brown Rowe & Maw LLP, Houston, TX, Peter Sean Fruin, Maynard Cooper & Gale, PC, Montgomery, AL, Sam E. Loftin, Loftin Loftin & Hall, Phenix City, AL, for Defendants.

MARK E. FULLER, Chief United States District Judge.

*1 On June 13, 2007, the United States Magistrate Judge entered a Recommendation (Doc. # 360) that sanctions be imposed against defendants because they withheld evidence during pretrial

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[1] Only the Westlaw citation is currently available.

discovery in bad faith and in violation of prior orders of this Court. The Magistrate Judge found that because of defendants' discovery violations, the plaintiffs were prejudiced in their presentation of evidence to the jury and on appeal. On June 26, 2007, defendants filed Defendants' Objections to Magistrate Judge Capel's June 13, 2007, [sic] Report and Recommendation (Doc. # 361).

As an initial matter, the Court finds that the defendants' objections to the Recommendation of the Magistrate Judge are largely without merit and most of the objections are due to be overruled. Indeed, in nearly all respects, the Court is persuaded by the factual findings and the legal reasoning of the Magistrate Judge set forth in the Recommendation.

Accordingly, after an independent review of the entire file in this matter, it is the ORDER, JUDGMENT, and DECREE of the Court:

a. That the objections filed by defendants (Doc. # 361), are OVERRULED in part and SUSTAINED in part as set forth below;

b. To the extent that the Recommendation (Doc. # 360) includes punitive sanctions of $26,470 payable to the Court, the Recommendation is REJECTED and the defendants' objection to that portion of the Recommendation is SUSTAINED. In all other respects, the defendants' objections are OVERRULED and the Recommendation of the Magistrate Judge (Doc. # 360) is ACCEPTED and hereby ADOPTED as the opinion of this Court;

c. To the extent that plaintiffs' motions (Doc. # 293, Doc. # 308, and Doc. # 308-1) seek an award of monetary sanctions against defendants for their conduct during discovery, those motions are GRANTED. Consistent with the Recommendation of the Magistrate Judge (Doc. # 360), it is hereby ORDERED that sanctions are imposed against Continental Carbon Company, Inc. and China Synthetic Rubber Corporation, jointly and severally, in the amount of $120,945.59.

WALLACE CAPEL, JR., United States Magistrate Judge.

This cause is now before the Court on the Plaintiffs' (collectively, "the property owners") [FN1] objections and motion to reconsider the magistrate judge's order denying sanctions (Doc. 346). The district court instructed the magistrate judge to consider "[a]ll issues relating to the appropriateness of monetary sanctions against defendants (collectively, "Continental") [FN2] raised by plaintiffs' motions (Doc. 293, Doc. 308, Doc. 308-1) [FN3] and all submissions in support of plaintiffs' requests for monetary sanctions as a penalty for alleged discovery violations" (Doc. 347).

Both parties have been given notice as to the discovery violations, have been given great latitude in their presentation of the issue of monetary sanctions, and have argued their positions at several evidentiary hearings held on January 19, 2005 ("Tr1"), August 18, 2005 ("Tr 2") (*sealed* in part) and November 10, 2005 (Doc. 349), extending over a period of three days. In addition, this court has reviewed in detail all of the exhibits produced by both the property owners and Continental in response to this court's previous orders, taken into consideration Continental's assertions as to attorney-client privilege, and has taken judicial notice of the entire record for purposes of this motion. Thus, fully illuminated by the parties, and taking into consideration the briefs and arguments of the parties, recommendation is made to the district court.

*2 Upon consideration of this matter, as further set forth herein, it is the recommendation of the magistrate judge that the motion for monetary sanctions be GRANTED.

The court will briefly review the history of this case to provide a sense of perspective before assessing the property owners' motion for reconsideration regarding monetary sanctions. Below is a discussion of the underlying dispute and the discovery battles that ensued for almost three-and-a-half years before this case was brought to trial.

A. Factual allegations

In August of 2001, the City, Action Marine and Tharpe brought a class action lawsuit for negligence, wanton conduct, breach of duty to warn, fraud, misrepresentation, deceit, nuisance, trespass, and strict liability.[FN4] The property owners claimed that emissions from CCC's Phenix City, Alabama plant damaged their property and health. It was alleged that 200 million pounds of a substance known as "carbon black,"and its associated waste gases, were emitted annually exposing surrounding residents to the toxins from the gases, and their property to dustings of the black and sticky carbon black substance. The City claimed damage to the Columbus Civic Center, the South Commons Sports and Entertainment Complex as well as Rigdon Park. Action Marine and Tharpe claimed damage to its inventory of boats and for the lost value of its business. Ditchfield sought damages for emotional distress, cleanup costs and for the diminution in value of his properties. In response, CCC claimed that no such pollutants were harmfully emitted from its plant to cause the property owners' damage. CSRC claimed that it did not exercise supervision and control over CCC, and as a result, were not directly liable to the property owners for any pollution from the plant.

Trial was held for ten days in August of 2004. The jury found Continental liable for nuisance, trespass, negligence, wanton and wilful conduct, and awarded compensatory damages in the amounts of $1.2 million to Action Marine, $570,000 to the City, $100,000 to Tharpe and $45,000 to Ditchfield. The jury also awarded $1,294,000 in attorneys fees and assessed punitive damages in the amount of $17.5 million. Final judgment was entered on January 31, 2005, and costs were taxed against Continental.[FN5] The judgment was appealed, and the Eleventh Circuit Court of Appeals upheld the verdict.[FN6]

B. Pertinent discovery history

Over the course of this hotly-contested litigation, requests for production of documents, interrogatories, requests for admissions, deposition requests and many court orders were generated in

connection with fleshing out the pertinent facts associated with the allegations brought by the property owners in this case. The property owners in their brief, and at the three hearings, as well as in many motions, outlined in detail the pertinent discovery requests made, and Continental's response to those requests. In response to this court's request to docket the alleged documents wrongfully withheld, the magistrate judge directed the property owners to submit the 19 individualized analytical charts, labeled Charts A through Chart S (consisting of 285 typewritten pages), to assist in the review of the alleged pretrial discovery abuses (Doc. 316). These Charts (Doc. 317, collectively the "PT charts") coincide with the actual documents withheld, Exhibits A through S (Doc. 293, collectively the "PT documents").

*3 The initial disclosure request of November 30, 2001, was general and asked for plant and equipment related documents, production and communications records relating to production of carbon black at the plant, and product data and installation records relating to equipment used to manufacture carbon black. The subsequent discovery requests became more specific. The PT charts outlined certain documents that were requested, but not disclosed, by the property owners prior to trial.

Chart A traced violations back to some of the original document requests generated in this case:

1. December 13, 2001: Property Owners' Requests for Production

Request 8 asked Continental to:

Produce copies of *any and all internal memos, emails, or any other type of communication discussing carbon black dust emissions or pollution,* either internally or with third parties, and complaints from citizens surrounding the Phenix City ContinentalCarbon plant ["the plant"].

Request 13 asked Continental to:

Produce copies of any *logs and/or monitoring reports and/or*

summaries relating to emission control, or prevention of emission of carbon black particulate matter into the environment from [the plant].

Request 16 asked Continental to:

Produce "*plant and equipment related documents data relating to the equipment currently used to manufacture carbon black* [and] installation records relating to equipment installed at [the plant].

(Doc. 317-2, pp. 1-2, *emphasis supplied).*

Continental's response to requests (8) and (16) was that the requests were overly broad and unduly burdensome and, to request (13) that it was vague and unclear, but that CCC would "produce such documents that are responsive to this request and that have been located after a reasonable review of corporate records."As to other responses, CCC would supply documents after "entry of an appropriate protective order"(Doc. 317-2, p. 6-7).

2. January 28, 2003: Property Owners' Second Consolidated Discovery Requests

In light of the original documents received, the property owners asked for certain admissions in their second consolidated request. Those included admissions that (1) CCC experienced problems with its bag filter systems at the plant, (2) CCC had frequent bag filter failures, and (3) bag filter failures resulted in carbon black emissions. In addition, the property owners requested further documents.

Request 3 asked Continental to:

Produce copies of all cost estimates, reports, executive summaries, or evaluations for continenal [*sic*] Carbon Company concerning environmental issues and improvements for the bag filter compartments at the Phenix City plant from 1998 to the present.

Request 4 asked Continental to:

Produce all emails within ContinentalCarbon Company

concerning economic justification and/or economic evaluation of improvements to the main bag filter system bag filters, and filter bags at [the plant] from 1998 to the present.

*4 Request 5 asked Continental to:

Produce all studies, reports and evaluations of carbon black leaks, spills, or discharges occurring as a result of reported, broken or torn bag filters or filter bags at [the plant].

(Doc. 317-2, p. 3).

The requests in Chart A established that the property owners requested (1) internal memorandum, emails, or any other type of communication discussing carbon black dust emissions or pollution, either internally or with third parties, (2) logs and/or monitoring reports and/or summaries relating to emission controls, or prevention of emissions of carbon black particulate matter into the environment from the plant, (3) data relating to the equipment currently used to manufacture carbon black, and installation records relating to equipment installed at the plant, (4) cost estimates, reports, executive summaries for improvements for the bag filter compartments at the Phenix City plant, (5) economic justification and/or economic evaluation of improvements to the main bag filter system bag filters, and filter bags at the plant, and (6) studies, reports and evaluations of carbon black leaks, spills, or discharges occurring as a result of reported, broken or torn bag filters or filter bags at the plant. The discovery violations addressed in this recommendation emanate primarily from the above requests.

In response to these requests, Continental identified that it produced records pertaining to maintenance, repair and design of equipment used in the carbon black production process, including bag filter compartments and related equipment (Doc. 317-2, p. 1-4). Yet it also claimed the property owners' requests were vague, ambiguous and unintelligible in using "bag filter"and "filter bag"as separate terms; burdensome, oppressive, vague, ambiguous,

and/or overly broad as to time period and scope; and that the information was not relevant to the subject matter of the litigation and not reasonably calculated to lead to the discovery of admissible evidence. Continental objected to other requests on similar grounds (Doc 317-2, p. 7-9).

The property owners brought motions to compel on February 18 and March 13, 2003 (Docs.92, 98). On March 18, 2003, the court advised that failure to properly respond to discovery requests in good faith could lead to sanctions (Doc. 101). On April 11, 2003, the court ordered supplementation of Rule 26 disclosures and ordered the retention of all records in the parties' possession throughout the pendency of the litigation (Doc. 111).

On March 25, 2003, the property owners brought motions to (1) compel discovery responses and for an order compelling corporate representatives for deposition, (2) reported to the court on outstanding discovery issues, and (3) prepared a brief in support of it motions (Docs.104, 105, 106, 109). Discovery status conferences were held on March 28, 2003 (Doc. 107), and April 4, 2003 (Doc. 110, placed under *seal*). On April 4, 2003, the court ordered the parties to supplement their Rule 26 disclosures (Doc. 117).

***5** Document inquiries were made by interrogatories prior to the depositions of the president of CSRC, Dr. Peter Wu ("Wu") on April 21, 2003, again addressing emails, documents, memoranda, reports, notes, letters, or communications of any and all kinds that he prepared, received or reviewed pertaining to CCC's environmental matters, capital or operational expenditure proposals and/or plant equipment problems. Wu's response was "I do not receive detailed operation reports pertaining to environmental matters or plant equipment problems at the Phenix City plant"(Doc 317-2, p. 10). Continental fought to prevent answers to the property owners' inquiries to Wu by arguing later at hearing that disclosures by interrogatories could only be addressed to party defendants.

On April 11, 2003, Continental was ordered to produce corporate representatives, Kim Pan ("Pan"), Leslie Ku ("Ku") and Wu for depositions (Doc. 112). On April 14, 2003, the magistrate judge allowed in her order for the property owners to propound 10 written interrogatories on Ku and Wu, and that these individuals should respond on or before May 5, 2003 (Doc. 113). As of September 4, 2003, Pan's deposition had not been completed because Continental had not disclosed documents requested for deposition which included the weekly/monthly operations reports concerning environmental issues with CCC. Continental continued to refuse to schedule the deposition of Wu, and other employees and officers. Though they were requested in the property owners' motion of March 25, 2003, requests for expenditure reports ("RFE's"), regarding pollution controls, had not been produced. In addition, the *in-camera* documents still had not been produced at this time (Doc. 132). The district judge denied the property owners' motions regarding discovery issues until class certification had been decided (Doc. 148). After the class certification was denied, the property owners renewed their motions to compel the depositions of Pan and Rodriguez, and this motion was granted on February 21, 2004 (Doc. 165).

On April 29, 2003, a hearing was held *in camera* and under *seal* because the property owners had obtained documents from non-party sources that were not previously disclosed by Continental (*See*, Doc. 117, p. 2, *in camera* Docs. P-1 through P-106). The property owners claimed that the subject documents supported its claim in prior motions that Continental intentionally suppressed documents going directly to issues that Continental had denied, including:

(a) The company's knowledge of the discharge of carbon black dust on the surrounding community;

(b) The causes of the problem;

(c) The names of those persons with knowledge of the

environmental and operational problems at the plaint [*sic*];

(d) Proposed cures and remedies for the pollution, operation and environmental problems;

(e) Delays in implementing corrections to the plant's operational and environmental problems; and

***6** (f) The costs involved correcting operational and environmental problems versus delays in making the corrections.

(Doc. # 117, p. 3).

The documents were placed under *seal* so that Continental was prevented from tailoring its responses so as to produce only those documents already in the possession of the property owners. The same documents were later offered for evidentiary submission by the property owners in response to Continental's Motion for Summary Judgment that was based in part upon Continental's assertion that CSRC "played no role"in the daily operations of CCC (Doc. 120, p. 2). At that point, the *sealed* documents still had not been produced by Continental.

The property owners requested another set of documents prior to the deposition of the president of CCC, Pan, on February 10, 2004. The property owners requested (1) all reports evaluating or explaining problems of any type of bag filters at the plant, and all reports of pollution, emissions, or fugitive releases of carbon black at the plant directed to management of CCC in Houston or to CSRC, (2) RFEs, executive summaries that pertained to the same, and (3) studies, reports and evaluations of carbon black leaks, spills, or discharges occurring as a result of reported, broken or torn bags at the plant. Similar documents were requested prior to the deposition of the Vice President of Operations for CCC, Juan Rodriguez ("Rodriguez") (Doc. 317-2, p. 3-6). On February 12, 2004, Continental was compelled to allow the depositions of Pan and Rodriguez (Doc. 165). Discovery cut-off was set for June 18, 2004 (Doc. 162). Issues of summary judgment were decided on June, 25, 2004 (Doc. 175).[FN7]

In light of the property owners' renewed motion to compel discovery, and after a hearing on the matter before the magistrate judge on August 6, 2004, the court granted plaintiff's motion to compel discovery of "redacted"documents, thermal oxidizer data, Triboguard readings, documents from the privilege log, predecessor documents, and to produce certain witnesses for trial (Doc. 192). Acutely aware of the discovery struggles that had taken place over the prior years, and responding to the Continental's objections to and appeal from the magistrate judge's August 6, 2004 order compelling discovery of a host of documents not yet provided, or provided only in part (redacted documents), the district court gave a final pre-trial warning in its order of August 10, 2004: "*The parties are hereby advised that failure to fully comply with the letter and spirit [of this Order] will result in the imposition of sanctions which will be swift in coming and painful in execution*" (Doc. 195, *emphasis supplied*).

The district judge overruled Continental's objections as to this order on August, 10, 2004, with another warning from the court as to cooperation (Doc. 195). Trial began on August 11, 2004.

Subsequent to trial, the property owners requested injunctive relief in accordance with the favorable judgment awarded by the jury. Permanent injunctive relief was granted on January 31, 2005, and a new discovery schedule was issued on all issues relating to the nature and scope of the injunctive relief. Responding to this issue, Continental submitted certain supplemental evidence.

***7** The district court, in an order dated January 31, 2005, denying the property owners' request to strike certain documents from the post-judgment consideration of injunctive relief, made this commentary as to Continental's conduct:

Defendants' admitted failure to comply with the letter and the spirit of the Federal Rules of Civil Procedure regarding discovery is deeply troubling to this Court. Indeed, given that *Defendants*

and their counsel have exhibited what can only be described as a pattern of disregard for the Federal Rules of Civil Procedure concerning discovery and this Court's prior discovery orders, the Court firmly believes that Defendants and their counsel are due to suffer some adverse consequences for their conduct. Despite this belief, the Court cannot find that the sanctions requested by Plaintiffs may be imposed pursuant to Rule 37(c)(1).

(Doc. 238, *emphasis supplied; see also* Doc. 293).

The property owners alleged that between March 28 and April 6, 2005, Continental produced 98,939 pages of documents that were both responsive to the property owners' new discovery requests, and which were discovered in a related state case filed in the Circuit Court of Russell County, Alabama (Doc. 293, p. 2).[FN8] Continental then produced another array of documents in May of 2005. All told there were over 100,000 pages of documents subsequently disclosed post-trial (Doc. 349:6). After reviewing the documents submitted by Continental, the property owners brought a motion claiming that Continental was now producing PT documents that they had never seen before, and which should have been provided prior to trial (PT documents, Exhibits A through S; *see also* PT Charts A through S). The property owners argue that this small batch of undisclosed documents was used to demonstrate Continental's intentional scheme to withhold large categories of documents (Doc. 349:7). Exhibits A through O involve a series of communications concerning a policy established by Continental as early as February of 2004 to withhold documents. The documents were offered to establish that top officials at CCC and CSRC agreed to hide evidence of environmental issues by filtering them though outside counsel, Tony Ching ("Ching"), for the purpose of claiming attorney-client privilege. Among the property owners requests were "any additional or further sanctions against Continental that the Court deems appropriate under the circumstances"(Doc. 230).[FN9]

The district court made further commentary as to

Continental's actions in their order of August 19, 2005. At that juncture, the property owners' had requested that the court supplement the record with the PT documents for purposes of Continental's appeal:

The Court held a hearing on this matter on August 18, 2005. *Defendants have established a pattern of conduct during the course of this litigation which is far from exemplary. In this Court's view their admitted decision to stop supplementing prior discovery responses or disclosures as of the end of December of 2003 cannot be justified as good faith compliance with either the orders of this Court or the letter and the spirit of the Federal Rules of Civil Procedure.*As this Court has previously observed, given that Defendants and their counsel have exhibited what can only be described as a pattern of disregard for the Federal Rules of Civil Procedure concerning discovery and this Court's prior discovery orders, the Court firmly believes that Defendants and their counsel are due to suffer some adverse consequences for their conduct.

*8 (Doc. 306, *emphasis supplied*).

In the same order, the court referred the matter to the magistrate judge for a ruling on monetary sanctions. The magistrate judge directed the property owners to provide a definitive sum as to sanctions, and to itemized attorney fees and expenses. In the property owners supplemental motion (Doc. 308, 308-1), they addressed the issue of monetary sanctions and provided an itemization of cost and attorney fees incurred in pursuing the post-trial motion regarding evidence wrongfully withheld. On November 10, 2005, the magistrate judge conducted a hearing on the property owners' supplemental motion. The property owners admitted additional exhibits containing other documents which Continental failed to produce prior to trial (Exhibits "Z," "AA" and "DD", Doc. 349:12-16).

These additional documents were produced to prove the

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connection between CCC and CSRC. Exhibit "Z" was an email to president Pan of CCC, and president Wu of CSRC (it was also sent to attorney Ching), suggesting a scheme to withhold evidence by routing documents through Ching. At the hearing, defense counsel for Continental affirmatively represented that no legal advice was sought or given in response to these documents (Doc. 349:32). Exhibit "DD" is a report that compiles monthly data of environmental problems relating to every single plant CSRC parented, including CCC (Doc. 349:15-17). Continental claimed "AA" was not in existence at the time of trial.

At the November 10, 2005 hearing, the parties stipulated to a $250 per hour rate for attorney fees (Doc. 319, 346), and the property owners filed itemized statements regarding the hours spend post-trial in their attempt to have the PT documents (1) struck from the record in the court's consideration of injunctive relief, (2) allowed to supplement the trial court's record for purposes of appeal, and (3) for purposes of monetary sanctions. The first two types of relief have been denied by prior orders of the court (Doc. 238, 306). Since the district court granted the property owners' motion for reconsideration of the magistrate judge's order of October 20, 2006, as it did not address monetary sanctions, this court now addresses that issue pursuant to the district court's mandate (Doc. 347).

A. The property owners' argument for sanctions

The property owners seek sanctions pursuant to the Federal Rules of Civil Procedure Rule 37 for Continental's deliberate failure to conceal information during the course of this litigation, and particularly, prior to trial. The property owners became aware of the PT documents with post-judgment disclosures, and by disclosures made by Continental in the related case filed on March 1, 2004.[FN10]The property owners claim that Continental produced emails describing an elaborate internal communication and document delivery scheme between defendant CSRC and CCC that was solely designed to keep discoverable information from the

property owners and their counsel prior to trial. The property owners argue that the PT documents should have been produced long ago in response to its numerous discovery requests and motions, many of which were reduced to orders to compel discovery against Continental. Asserting prejudice because the PT documents were not available for review before the Eleventh Circuit Court of Appeals,[FN11] the property owners requested sanctions in an amount equal to the judgment,[FN12] or in the alternative, that monetary sanctions should include all attorneys' fees and expenses incurred by the property owners, in addition to the time and effort spent by this court, in addressing Continental's pattern of disregard for the Federal Rules of Civil Procedure, including violations of this court's prior discovery orders. They argue "[u]nless such penalty is imposed against the defendants in the form of monetary sanctions, the integrity of the judicial process will be greatly diminished and the defendants will consider themselves free to offend that process again in the future" (Doc. 346, p. 10-11).

B. Continental's argument against sanctions

*9 Continental contends that Rule 37(a)(4)(A) is not applicable because the PT documents were not produced pursuant to a motion to compel, rather, the PT documents were produced to different property owners in response to different document requests in another case against the same defendents. Counsel for Continental claimed at the hearing on August 18, 2005, that Exhibits A through S were produced in the *Riley* litigation in Alabama state court, and not in this case. In a similar argument, after admitting that it had an obligation to produce certain documents and supplement its discovery responses, Continental argued that even if some of the PT documents should have been disclosed, that the error was harmless because the property owners prevailed at trial. Essentially, what Continental purports is, as long as the property owners prevailed, it does not matter if Continental cheated in its' attempt to win. Continental also

claimed in its' responses that certain documents were subject to attorney-client privilege. Finally, Continental argues in its brief that Rule 37 does not apply to evidence discovered post-trial.

C. Rule 37

Rule 37 governs sanctions for a party's failure to disclose required discovery information. It states as follows:

A party that *without substantial justification* fails to disclose information required by Rule 26(a) or 26(e)(1), or to *amend a prior response* to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. *In addition to or in lieu of this sanction, the court,* on motion and after affording an opportunity to be heard, *may impose other appropriate sanctions.*In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B) and (C) and may include informing the jury of the failure to make the disclosure.

Fed.R.Civ.P. 37(c)(1) *(emphasis supplied).* Pursuant to Rule 37, the court may also (A) order certain facts to be taken as established, (B) prohibit the disobedient party from supporting the designated claims or defenses, or from introducing evidence, and (C) strike pleadings, stay proceedings, enter a default dismissal of the action or judgment, or award monetary sanctions. Fed.R.Civ.P. 37(b)(2)(A)-(C).

The court is not, however, limited to actual harm caused by the misconduct. Rule 37(C)(1) sanctions are broad and encompass not only the rectification of actual harm, but also allow for sanctions for a defendant's failure to maintain and preserve the sanctity of the court and to respect its rules. A district court may impose "an order treating as contempt of court the failure to obey any orders." *Ins. Corp. Of Ireland v. Compagnie des Bauxites de Guinée,* 456 U.S. 694, 695, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). Contempt

may be either civil (remedial) or criminal (punitive-to vindicate the authority of the court). *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827-28, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). A finding of failure to comply with discovery orders is a finding of civil contempt. *Id.* at 833.

***10** The court also has inherent powers to impose sanctions to achieve the orderly and expeditious disposition of cases where a party's conduct disrupts or impairs the judicial process, especially where there is bad-faith conduct. As the Supreme Court indicated in Chambers:

[I]t is firmly established that "[t]he power to punish for contempt is inherent in all courts." This power reaches both the conduct before the court an that beyond the court's confines, for "[t]he underlying concern that gave rise to the contempt power was not ... merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial."

* * *

When there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power. *Id.* at 50.

Chamber v. Nasco, Inc., 501 U.S. 32, 44-45, 50, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *see also Byrne v. Nezhat*, 261 F.3d 1075 (11th Cir.2001).

Continental claimed at the hearing on August 18, 2005, that it should not be sanctioned because some of the PT documents identified in Exhibits A through S were produced in the *Riley* litigation in Alabama state court, and were not documents produced in this case post-trial.[FN13] Continental's argument is without merit. The sanctions under Fed.R.Civ.P. 37 are predicated

upon a party's *failure* to disclose information that *should* have been disclosed pursuant to Fed.R.Civ.P. 26(a) or 26(e)(1),[FN14] or *failure* to amend a prior response to discovery as required by Fed.R.Civ.P. 26(e)(2).[FN15] As further discussed below, this court finds that the large majority of the PT documents should have been disclosed in response to properly promulgated requests and prior orders of this court.

Continental also argues that sanctions should not be imposed because the property owners were not harmed given they prevailed at trial. This argument is also without merit. To require the property owners to prove that the verdict would have been greater if they had the benefit of the undisclosed documents would be manifestly unfair. "[A] litigant who has engaged in misconduct is not entitled to ' the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.' " *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir.1978), *citing Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521-22, 51 S.Ct. 501, 75 L.Ed. 1243 (1931).[FN16]

In addition, Continental claims that the property owners have never linked the undisclosed information to particular discovery requests and that its prior responses were not deficient in any "material respect" (Doc. # 314, p. 3). This argument is refuted by the 19 analytical charts provided by the property owners, Charts A through S, which coincide with Exhibits A through S, appended to the property owners' motion to supplement the trial court record (Doc. 293-1, Doc. 316). Each chart identifies the pertinent discovery request and attaches the specific PT document that was provided post-trial, highlighting the information that related to the request. For example, Chart A outlined the requests made on December 13, 2001 and January 28, 2003, and indicated Continental's response to those request, as noted above.FN17 The property owners outlined other violations as they related to the balance of the PT documents (Charts B-S). In addition, Exhibits Z,

AA and DD, submitted at the November 10, 2005 hearing, outlined further abuses. The abuses primarily pertain to emails between key company personnel, and altered or sanitized documents that revealed that CSRC exercised dominion and control over CCC. This court now discusses more fully the violations in connection with the property owners' numerous requests both pre- and post-trial.

1. Emails

*11 The property owners established that the post-trial discovered information included emails between key officers and employees of CCC and CSRC (Exhibits A through O). In Exhibit A, there are questions coming from CSRC to CCC asking about bag filter problems at the plant. In Exhibit B, there is a March 8, 2004, email from the President of Operations, Rodriguez of CCC, to a CSRC officer discussing problems with equipment (found in daily reports-also not disclosed) at the plant. In Exhibit C, Rodriguez informed Pan, Wu and others of the following:

At the present time the Phenix City Plant has a lawsuit against it alleging that environmental emissions have negatively impacted a community in Columbus, Georgia. Among other required information, we are required by law to provide the opposing attorneys all correspondence (including emails) related to Phenix City bagfilters *[sic]. As you know, the opposing attorneys will take the information and try to show CCC and the Phenix City plant to the jury and public as badly as possible. For that reason, I am asking you to not ask any more questions regarding bagfilter issues or any related environmental emission questions. If you have a need to have more information, please call David Pacobit directly. Or better still, please send the question via our attorney, Tony Ching (with copy to Amy Mathis, and me), so that the information can remain an attorney-client previlege [sic].*

We apologize for this request, but it is important that we not continue to create a larger problem for ourselves than we already

have. If you have any questions, please do not hesitate to let me know. Sorry for the inconvienance [*sic*].

(Doc. # 293-4, Exhibit C, *emphasis supplied*). This email alone suggests an intent by the parties, as of March 10, 2004, to subvert the discovery process.

Continental also argued strongly in their objections to deposing Pan and Wu prior to trial, that these officers knew nothing about environmental problems (Doc. 317-2, Chart A, p. 10; 349:39). The property owners persuasively argue, however, that the collection of emails (Exhibits A through O) suggests additional communications *not disclosed* regarding discussions about environmental issues and pollution control equipment between CCC and CSRC. An email from Rodriguez of CCC (Exhibit Q), instructs the corporate environmental officer of CSRC, to channel SHEA weekly reports through Ching, and to sanitize the documents for further use. The property owners never received the SHEA reports, which were a summary of environmental matters, either before or after trial.

The property owners argue that the filtering of emails was clearly designed to monitor communications between CCC and CSRC for purposes of minimizing the link, in term of the scope of knowledge regarding defects and leaks, between the parent and its subsidiary. Continental's intention is made clear by Exhibit Z. In this email, Rodriguez sent the following message to Ching (questioned by the magistrate judge *in camera*, Doc. 305), and other executives at CCC and CSRC, including Wu and Pan:

*12 I think I understand how confusing it may be to have to work under restricted communications with CCC personnel at this time; but, it is very important that we maintain a specific discipline in communications because CCC is under very strict scrutiny by attorneys that would like nothing better than to be able to use CCC to get to CSRC.

* * *

The fact of the matter is that CCC does not have a lot of money, so if the opposing attorneys were to win their case against CCC, they would not really win much. However, it is my understanding that *if the opposing attorneys were to be able to win their case against CCC and make the link between CCC and CSRC; then they might be able to get money from CSRC. At the advice of our legal people, we are making every effort to prevent the opposing attorneys from making the link. This is why we have asked that certain subjects be run through Mr. Tony Ching, CCC's attorney. This is an attempt to keep that information attorney-client privilege, which means that it is legally invisible to the opposing* But we have to follow strict criteria; it must be sent to Tony Ching, copies only to those that need to know and no one else. The subject matter at this time that needs to go to Tony Ching is subject matter that relates to

1. Bag filters,

2. Thermal oxidizers,

3. Environmental issues,

2. *Any communications that would appear to the Courts or a trial jury that CSRC is exercising control on CCC, particularly capitol* [sic] *budget or a request for expenditures.*

Because this is one way the opposing attorneys would attempt to prove to the legal court that it is not the CCC board that controls CCC but instead, CSRC. Therefore, we have to use caution in our communications pertaining to RFEs.

Doc. 349, Exhibit Z, *emphasis supplied; see also* Doc. 299, Exhibit J ("Communication Guidelines" for written communications relating to bag filters, thermal oxidizers, safety equipment, safety complaints, inspections or other sensitive issues, or other issues relating to litigation).

The relationship between CCC and CSRC was at the heart of the property owners' claim that the parent CSRC knew of the

extent of the leakage problem at the subsidiary CCC. Yet, the PT documents were supplied post-trial, while seeking relief from the trial court's order for Continental to repair, rebuild and/or video monitor bag filters and thermal oxidizer equipment. As the magistrate judge observed at the hearing on November 10, 2005, "the Court would be remiss if it did not consider the scheme or pattern identified by Judge Fuller in his order of withheld documents" (Doc. 349:4).

2. Altered and "Sanitized" Documents

Many documents were altered by Continental before being produced in response to orders to compel discovery. These documents included corporate environmental reports, RFEs, and plant operations reports (Doc. # 293-18, 19, 20 [Exhibits Q, R & S]). It was instructed that these document also be filtered through Ching to be "sanitized" (*See* Exhibit Q). The property owners' Exhibit R, disclosed after trial, showed that CSRC knew that a component of CCC's carbon black production system had "become a potential environmental risk with it leaking daily." Yet, Continental had produced only the sanitized version prior to trial that deleted this very important information. Exhibit R was a request for expenditures, an RFE, to CSRC explaining the problems with the bag filter at the plant, and that it was leaking carbon black. The approval for repairs went up the chain of command and included approval by CSRC management (Doc. 349:48).

*13 The property owners argue these documents provided further support of the relationship between the two corporations. Post-trial, Continental introduced these RFE documents to prove that repairs had been made. Hence, the documents were clearly relevant to the determination that the bag filter problem existed *prior to trial,* as the repairs were made thereafter (Doc. 349:50). Exhibit S identified as "operational weekly reports" dated September 12 through 18, 2002, and January 1 through 8, 2003, were other documents that were "redacted," i.e. parts of the

documents were deleted prior to disclosure. One such document discussed visits by CSRC to CCC for purposes of reviewing major CCC capital projects for 2003 (Doc. 349:54). At earlier proceedings, Continental claimed that the redacted documents were based on attorney-client privilege. It is noted that Continental denied that the documents were subject to attorney-client privilege at hearing on November 10, 2005, and none of the PT documents were referenced on the trial privilege log (Doc.349:44).

This court find that these documents were responsive to original discovery requests and subject to, at the very least, this court's order issued August 6, 2004, the Friday before trial. Hundred of documents were produced on the eve of trial, but the PT documents were not among them. The property owners argue that many of these documents went to the issue of the extent of the operational and environmental problems at CCC, and that Continental "sanitized" certain documents to keep this information from reaching the jury. This court agrees. The undersigned finds that the majority of documents, Exhibits A through S, were responsive to the property owners' pretrial discovery requests. This court also finds that those in the corporate chain of command supported the withholding of relevant evidence, that there was a scheme to withhold these documents and that there may be other undisclosed documents of a similar nature still undisclosed.

Indeed, it appears that the sequence of events throughout the litigation, in addition to the document delivery scheme between the parent corporation, CSRC and it subsidiary CCC, evidenced a deliberate choice by Continental to hide certain evidence by stonewalling and by claiming attorney-client privilege to prevent disclosure of relevant and important evidence prior to trial. Continental's attempt to claim mere oversight seems disingenuous given it disclosed *some* of requested documents in a *related case*, and also used the PT documents for the *purposes of staving off the injunctive relief* sought by the property owners post-trial. After

being questioned by the court, Continental admitted that it did not produce Exhibits A through M, P or Q, and only produced in part Exhibits R and S (*See* Evidentiary Submission in Compliance with this Court's Order of October 6, 2005 filed by Continental, Doc. # 318).[FN18]

Continental also admitted that they decided to stop supplementing prior discovery responses or disclosures at the end of December of 2003, even though they were reminded in this court's order of January 28, 2004, to exercise due diligence, to respond to requests reasonably and promptly, to avoid discovery disputes, to communicate promptly and directly when differences surface and to "cooperate as Officers of the Court with each other and with the court in the resolution of discovery disputes" (Doc. 164, p. 2). The court stated further in its January 28, 2004 order:

***14** In the interest of preserving already-scarce litigation resources for everyone, counsel are advised to apply a conciliatory- rather than adversary-approach to the resolution of their discovery disputes. Their failure to do so will invite this court's consideration of sanctions upon the offending party or counsel. The parties are further reminded that the Court of Appeals has upheld the award of sanctions against a law firm and its client for discovery abuses. *See Bank Atlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045 (11th Cir.1994); *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510 (11th Cir.1986).

These cases are instructive. The district court in *Bank Atlantic*, ordered in part: (1) that defendant produce all witnesses and documents, (2) that defendant bear reasonable costs of plaintiff's time and preparation in filing the motion to strike and in preparing for the new trial, including the costs of expedited discovery, (3) that a $250,000 bond for plaintiff's costs (to be determined post-trial) be obtained, (4) that defendant's asserted privileges be waived, (5) that the plaintiff be awarded triple interest if it prevailed on the merits, (6) that an instruction be given to the jury on defendant's failure to produce discovery as a

factor to be considered in determining defendant's liability, and (7) that its order be published in the official reporter to deter future misconduct. *Bank Atlantic v. Blythe Eastman Paine Webber, Inc.*, 127 F.R.D. 224, 234 (S.D.Fla., 1989). The circuit court affirmed the district court's sanctions. *Bank Atlantic*, 12 F.3d at 1052.

In *Pesaplastic, C.A.*, the district court held the attorneys therein to be in contempt. It awarded sanctions of reasonable expenses, including costs and attorney fees, after a hearing on plaintiff's motion to compel, where the attorneys conducted themselves "in a manner not befitting officers of the court" and where they failed to "deal honestly and fairly with opposing counsel."799 F.2d at 1522. The court added:

The attorneys of the Law Firm have clearly failed to fulfill these duties. Indeed, they represent yet another case of attorneys having "' sold out to the client.' "*Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1154 (11th Cir.1985)... In so doing, the attorneys of the Law Firm lost sight of the fact that, as members of the bar, and officers of the court, or primary responsibility is not to the client, but to the legal system. Our judicial machinery is dependent upon the full support of all members of the bench and bar. Advocacy does not include "game playing." Conduct such as that engaged in here must not, and can not and will not be tolerated.

Id. at 1522-23.

The PT documents go directly to the key issues in the case. First, they go to the issue of whether there were fugitive emissions at the plant. Indeed, counsel for Continental argued during trial, and represented to the jury, that there were few emissions, or if there were any emissions, that they were not harmful (Tr 1:36). Second, they go to the issue of the relationship between the parent and it subsidiary, and the liability attributable to each. The property owners provided detailed charts indicating how each of the documents requested were responsive to pre-trial discovery

requests, motions and orders of this court. Continental made arguments as to some of the documents but, in the end, admitted that it did not produce them. It also did not give an adequate justification for withholding the PT documents. This court is convinced that the majority of the PT documents requested were subject to disclosure under Fed.R.Civ.P. 26(a), 26(e)(1) and 26(e)(2) (duty to supplement) (*See* Doc. 293-1, p. 2-3), and Continental was required to make all reasonable efforts to produced them. *Pesaplastic, C.A.,*. 799 F.2d at 1521. Thus, it is found that Continental willfully, openly and in bad faith refused to comply with direct orders from this court.

*15 It is further noted that defendant CSRC is making the claim on appeal that they are entitled to judgment as matter of law ("JMOL") or remittitur based on insufficiency of evidence regarding direct liability of CSRC (Doc. # 281, p. 10), a position this court notes is inconsistent with the documents withheld. The intent of Continental on appeal is to reduce the verdict, reverse one or more components of the case or obtain a new trial. If they are successful, Continental's strategy to withhold evidence until the post-trial stages would enure to them great benefit. Barring that, there is still the issue of the waste of time and expense of this court in the pre- and post-trial discovery battle that has gone on for some six years. Thus, this court has determined by a review of the record, the PT documents were relevant, intentionally withheld by officers and employees of Continental [FN19] and their counsel, particularly Ching; they were non-privileged and not subject to other protections.

Absent from Continental's arguments is a justification as to why it was proper to force the property owners to seek court intervention over and over again, wasting huge amounts of time and money secure responses to discovery requests, when good faith compliance with the Federal Rules of Civil Procedure would have made such continuous and costly intervention unnecessary. In fact, it appears from the record in this case, that Continental

concealed their non-compliance with discovery requests and orders until after the trial, by systematically ignoring adverse rulings, and now argues post-trial that because the documents were discovered after a verdict was rendered the violations do not count.

In addition, defendant argues that, if discovery violations are found, that the appropriate remedy is a new trial. Defendant cites to *Rozier, supra,* for the proposition that this is the *correct* remedy (and by the supposition suggests that monetary sanctions are not). In *Rosier,* however, *the plaintiff* was requesting a new trial, and the district court had to determine whether the trial court abused its discretion by denying this request under Fed.R.Civ.P. 60(b)(3). The district court concluded that the defendant had perpetrated a "fraud upon the court" by withholding properly requested undisclosed documents and, as such, granted a new trial to plaintiff for the egregious misconduct.*Rosier,* 573 F.2d at 1337-40. As in the instant case, the documents were discovered post-trial. As in the instant case, the documents were properly requested, and the court had issued orders to compel prior to the trial's inception. The case addressed Rule 60 instead of Rule 37, but the policy considerations were the same. The most compelling and overriding policy consideration was adherence to the discovery rules for the proper functioning of the civil litigation process in general:

Our system of civil litigation cannot function if parties, in violation of court orders, suppress information called for upon discovery. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Hickman v. Taylor,* 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947).... The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial ... The aim of these liberal discovery rules is to "make a trial less a game of blind

man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958).... It is axiomatic that "discovery by interrogatory requires candor in responding."*Dollar v. Long Mfg., N. C., Inc.*, 561 F.2d 613, 616 (5th Cir.1977).

*16 *Rosier*, 573 F.2d at 1345.

It is interesting to note that Continental is asking for one of the harshest sanction (new trial) if it is found that it violated the discovery provisions of the Federal Rules of Civil Procedure. Since Continental lost below, this court recognizes that the defendants would possibly *prefer* a new trial because it would give them a second bite of the apple and, potentially, a different (and hopefully, smaller) outcome. This result could actually enure to Continental's benefit, yet the goal of Rule 37 sanctions is to compensate, deter and even punish discovery violations that were committed wilfully and in bad faith. *Goodman v. New Horizons Community Service*, Slip Copy, 2006 WL 940646 (11th Cir.2006). In *Goodman*, the Court succinctly stated: "Rule 37 sanctions were designed not merely to penalized those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Id., citing Carlucci*, 775 F.2d at 1447. Granting a new trial would not necessarily be a deterrent in the instant case, unless this case is reversed on appeal.

The record is replete with motions and orders in connection with discovery requests made of Continental by the property owners. The court in its various orders gave Continental several warnings as to their less than exemplary "established pattern of conduct." The documents in question provide accounts of the internal discussions between CCC and CSRC regarding needed improvements and prevention of carbon black emissions at the Phenix City, Alabama plant. The entire focus of the case revolved around whether there were carbon black emissions that affected

the surrounding property owners and whether CSRC knew of the leaks and/or were involved in authorizing repairs.

It is interesting to note that, after the jury found in favor of the property owners, Continental subsequently submitted these very documents post-trial to stave off injunctive relief claiming the emissions were sporadic and isolated. The value of the documents was evidence by Continental's reliance on them in its' post-trial arguments. Continental has not supplied any substantial justification for withholding these documents; it stated in oral argument, "I cannot explain why those particular documents were not produced" (Tr 1:25), and that it could have been an "oversight" (Tr 1:37). Continental admitted that it should have disclosed certain documents (Tr 1:39). It later argues that the documents were not reviewed for relevance (Tr 1:25). However, it is clear that Continental had plenty of time to make this analysis.

The property owners claim that they would have changed the way the case was presented at trial [FN20] and that it would have strengthened the record on appeal as to actual damages and punitive damages (Doc. 306, p. 10-11, 14-15). They also argue that disclosure could have possibly shortened the trial and made settlement more likely. They further claim, and this court agrees, that early disclosure would have undeniably saved this court valuable time, and the constant battling over disclosures wasted the courts' resources (Tr 1:32). It is also noted that Continental had to be compelled through repeated motions and after sometime lengthy oral arguments [FN21] on various motions, to deliver documents that routinely should have been disclosed. One of the last orders, done on August 6, 2004, four days before trial began, ordered Continental to produce the full text of redacted [FN22] documents, ADEM reports (Exhibit A), Plant Safety Assessment data and privilege logs (Exhibit H) (Doc. 195, p. 4-5). Even at the midnight hour, Continental was contemptuous of direct orders from this court. It was Continental's contumacy, rather than its oversight, that led to Continental's failure to disclose documents

prior to trial. In light of all this, it cannot be argued that the error was harmless.

D. Civil Sanctions: Attorney Fees and Costs

*17 There is no question that Continental failed to comply with direct orders from this court to produce documents the property owners requested during discovery. Plainly, the PT documents evidence a rash of violations to which Continental has no valid response. Continental admitted that it did not produce them. The emails, alone, show a purposeful scheme to prevent the property owners from discovering documents that Continental viewed as harmful to their defense of the case. This court finds that Continental was required to produce pertinent documents contained in Exhibits A through M, P and Q, parts of R and S, as well as Exhibits DD and Z pursuant to Rule 26(a), 26(e)(1) and 26(e)(2) of the Federal Rules of Civil Procedure.

A finding of failure to comply with discovery orders is a finding of civil contempt. *Int'l Union, United Mine Workers of Am.*, 512 U.S. at 833. Rule 37 sanctions such as attorney's fees may be imposed without a showing of willfulness or bad faith on the part of the disobedient party, however, the most severe sanctions of default judgment or dismissal cannot be imposed for violation of a discovery order caused by simple negligence, misunderstanding or inability to comply. *Bank Atlantic*, 12 F.3d at 1049. This district court has "broad, although not unbridled, discretion in imposing sanctions" under Rule 37. *Pesaplastic, C.A.*, 799 F.2d at 1519, citing *Dorey v. Dorey*, 609 F.2d 1128, 1135 (5th Cir.1980).[FN23] This is especially true when the court imposes monetary sanctions. *Id.* Failure to produce documents or individuals for deposition pursuant to motions to compel forms a sufficient basis for the award of attorney's fees. *Id.* A basis for the reasonableness of the fees may be determined by analyzing the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *See, Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

In connection with their motion, the property owners submitted a statement of costs that included a detailed summary of the time and expense incurred by the respective counsel for the various property owners (354-1, Exhibit A). The parties stipulated to a $250.00 per hour rate for attorney fees. The law firm of Beasley, *et al.*, expended 189.20 hours of time and $806.13 in expenses for a total of $48,106.13, in connection with this motion. The law firm of Friedman, *et al.*, expended 206.50 hours and $1,386.90 in expenses, for a total of $42,852.50 (*See* Doc. 354, amended to $42,239.40 in Doc. 357). The law firm of Jackson, *et al.*, incurred 78.85 hours and $1,087.59 in expenses, for a total of $20,800.09 (*See* Doc. 354, amended to $20,400.09 in Doc. 357).

Continental claims the requested costs as submitted are objectionable for the reasons that entries prior to September 9, 2005, were not incurred in making the [supplemental] motion and further claims that "[t]he majority of the expenses claimed were incurred in preparing the Motion to Supplement the Record that was denied by the court" (Doc. 356, p. 3). However, the district court made a finding that monetary sanctions were warranted as early as July 17, 2005, and even though it did not grant the property owners request to supplement the record, it invited them in a later order to propose specific monetary sanctions that might be appropriate. The property owners were successful in proving that Continental violated discovery requests, (and this court made several warnings prior to trial, as well), as to Continental's pattern of disregard for the Federal Rules of Civil Procedure and this court's prior orders. It was only a matter of this court determining what, if any, monetary sanctions were appropriate under the circumstances. While this court does not now consider pre-trial attorney's fees because the jury awarded attorney's fees for the property owners' pre-trial efforts, there is still the matter of *this court's* pre-trial efforts to resolve the many disputes concerning discovery matters initiated because Continental failed to turn over documents that in post-trial retrospect clearly should have been disclosed long before they were later discovered. There

were 65 entries in the docket sheet pre-trial, and 45 post-trial. *See, infra,* at note 25.

*18 Continental claims that some of the entries pertain to the property owners' efforts to supplement the trial court record, relate to the injunctive relief order, and relate to mediation. To the extent that such fees are included in the property owners' statement of cost, they are found unreasonable.[FN24]

Continental claims that the entries are excessive because multiple attorneys reviewed documents and attended hearings. This court notes there were multiple property owners making claims, and the documents produced in this case were voluminous. Continental also was represented by numerous counsel who similarly reviewed documents and attended hearings. If it were Continental's motion, this court does not doubt that it would be asking for attorney's fees for each and every counsel that participated in the work. Therefore, the work of multiple attorneys for the property owners is found reasonable.

Continental also objects to the time spent preparing the analytical Charts A through S. Yet, these charts were used by this court, on more than one occasion, to evaluate if violations occurred, and to determine the appropriateness of sanctions for Continental's decided failure to disclose evidence. Continental further contends that a reasonable rate for some attorneys charge should be $185 per hour and paralegals' rate at $75 per hour (and defendant claims that paragraph 5 of the property owners' submission improperly calculates all attorney and paralegal time at $250 per hour), yet, Continental does not deny that it stipulated to a rate of $250 per hour as reasonable. Moreover, a closer reading of the document shows the property owners did not charge paralegal time at $250 per hour. And, the property owners claim in their brief that they were conservative in the number of junior partners and associates to which it applied this rate (Doc. 357-2, p. 5). In light of all that has transpired, this court finds their claim credible.

E. Punitive Sanctions

Though it responds to sanctions regarding attorney's fees, Continental does not provide any cogent response to the property owners' argument that the many docket sheet entries prior to and post-trial relate in one form or another to the court having to expend time and resources to address Continental's discovery abuses.FN25 Whether it would have shortened trial is speculation, at best, considering the contentious nature of the dispute. However, considerable time *was* spent by the district judge and his staff, the magistrate judge and his staff, and courtroom personnel attending to the various motions and hearings associated with discovery abuses beginning as early as October 2001.

Coercive sanctions by way of fines are generally left to the district court's discretion. In *Serra*, the court stated:

The broad discretion of the district court to manage its affairs is governed, of course, by the most fundamental safeguard of fairness: the Due Process Clause of the Fifth Amendment. *See Ins. Corp. Of Ireland*, 456 U.S. at 707, 102 S.Ct. at 2106-07. To comply with the Due Process Clause, a court must impose sanctions that are both "just" and "specifically related to the particular claim" which was at issue in the order to provide discovery.

*19 *Serra Chevrolet, Inc., v. General Motors Corp.*, 446 F.3d 1137, 1151 (11th Cir.2006); *see also In re Grand Jury Subpoena Duces Tecum*, 955 F.2d 670, 673 (11th Cir.1992) (The imposition of a coercive fine is proper for failure to produce documents, and will not be reversed except for an abuse of discretion). The fine for misconduct must be based on the record evidence and a rationale. *Carlucci*, 775 F.2d at 1146. The cost to the court of the numerous motions, hearings, and orders are an appropriate consideration. There must be, however, some reasonable basis for the accounting of costs and a record of its reasons for the imposition of any fine. *Serra*, 46 F.3d at 1152.

In light of the requirements of *Serra* and *Carlucci,* this court has calculated its approximate time from the date of its last order to compel, August 8, 2004 (Doc. 192). By that date, all of the PT documents should have been disclosed to the property owners. The rest of the time calculated by this court pertains to post-trial discovery orders and recommendations regarding the PT documents (*See* Appendix I, attached, itemizing the court's time for the various entries on the docket sheet pertaining to the evidence wrongfully withheld). Over one hundred hours were spent by this court and its personnel addressing issues relating to the PT documents post-trial. As $250.00 per hour was considered a reasonable rate for counsel's efforts, it is at least as reasonable for the judges' and their staffs' efforts. Many hours were spent issuing orders, conducting hearings and conferences, reading through transcripts and the immense volume of motions, briefs and exhibits. As to the hearings themselves, a court reporter and courtroom deputy also had to be present for the ten-and-a-half hours that were spent listening to the arguments of the parties. Comparable to paralegals, we find that $75.00 per hour is reasonable for the time expended for other courtroom personnel. While the estimated time is not exhaustive of all the court's resources expended to address the egregious discovery abuses, and only considers a small portion of the time spent *pre-trial,* it allows some reasonable basis to account for the imposition of additional fines against the offending party.

This court concludes that Continental withheld evidence in bad faith and in violation of prior orders of this court. As a result, because of Continental's discovery violations, the property owners have been prejudiced in their presentation of the evidence to the jury, and on appeal.

Thus, based upon consideration of the property owners' objections and motion to reconsider the magistrate judge's order denying sanctions (Doc. 346), and the district court's order (Doc. 347, instructing this court also to consider Docs. 293, 308, 308-1),

and for good cause shown, it is the RECOMMENDATION of the magistrate judge:

1. that the Motion be GRANTED;

2. that sanctions be imposed against CCC and CSRC, jointly and severally, in the amount of $120,945.59, for attorney fees and costs (itemized above) of the property owners' time and expense to pursue post-trial litigation in regard to the PT documents;

***20** 3. that additional sanctions be imposed against CCC and CSRC, jointly and severally, in the amount of $26,470.00 for the time and effort spent by the court and its staff from August 8, 2004, in connection with the ongoing litigation of discovery abuses;

4. that the additional sanctions of $26,470.00 is to be paid to the clerk of the court;

5. that this Recommendation be published in the official reporter to deter further misconduct by Continental and like-minded third parties, including litigants and attorneys alike;

It is further

ORDERED that on or before June 26, 2007 the parties may file objections to the Recommendation. Any objections filed must specifically identify the findings in the magistrate judge's Recommendation to which the party is objecting. Frivolous, conclusive or general objections will not be considered by the district court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and advisements in the magistrate judge's Recommendation shall bar the party from a de novo determination by the district court of issues covered in the Recommendation and shall bar the party from attacking on appeal factual findings in the Recommendation accepted or adopted by the district court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir.1982).*See Stein v. Reynolds Securities, Inc.*, 667 F.2d

33 (11th Cir.1982); *see also, Bonner, supra,* adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

08/06/2004 *193 Minute Entry for proceedings held before Judge Vanzetta P. McPherson: Discovery Motion Hearing held on 8/6/2004 re 178 MOTION to Compel and 191 MOTION for Protective Order filed by Continental Carbon Incorporated. (Digital Recording: 1:39 to 3:17)(sl,) (Entered: 08/09/2004)	10.50
08/10/2004 *195 ORDERED that the defendant's 194 Objection to and Appeal of the Magistrate Judge's 8/6/04 192 Order is OVERRULED and the challenged ruling of Magistrate Judge McPherson is AFFIRMED. The parties are hereby advised that failure to fully comply with the letter and the spirit of the 8/10/04 Order will result in the imposition of sanctions which will be swift in coming and painful in execution.. Signed by Judge Mark E. Fuller on 08/10/04. (sl,) (Entered: 08/10/2004)	2.00
10/22/2004 *231 ORDER re 230 MOTION to Strike and MOTION for Sanctions filed by The City of Columbus, Ga, Action Marine, Inc., John Tharpe, Owen Ditchfield. Brief in Support due by 11/3/2004 for plaintiffs; Show Cause Response due by 11/17/2004 for defendants as to why the motions should not be granted. Signed by Judge Mark E. Fuller on 10/22/04. (cc,) (Entered: 10/22/2004)	1.00
01/06/2005 *234 ORDERED that a hearing be held on 1/19/2005 at 1:00 PM at the United States Courthouse, One Church Street, Courtroom 2A, Montgomery, AL. The parties should be prepared to address the merits of the plaintiff's pending requests for injunctive relief and the 230 Motion to Strike Certain Defense Exhibits Wrongfully Withheld in Discovery and Request5 for Sanctions. Signed	.50

by Judge Mark E. Fuller on 01/06/05. (sl,) (Entered: 01/06/2005)

01/31/2005 *238 ORDER denying 230 Motion to Strike certain defense exhibits wrongfully withheld in discovery; denying 230 Motion for Sanctions. Signed by Judge Mark E. Fuller on 01/31/05. (mfm,) (Entered: 01/31/2005) 2.00

02/17/2005 *TRANSCRIPT of Motions Hearing held on 1/19/05 in Montgomery, AL before Judge Mark E. Fuller. Court Reporter: James R. Dickens. (sl,) (Entered: 02/18/2005)

2/21/2005 *253 First MOTION To Shorten Time for Response to Interrogatories and Request for Production of Documents by The City of Columbus, Ga, Owen Ditchfield, John Tharpe. (Friedman, Jeffrey) (Entered: 02/21/2005)

02/24/2005 *254 ORDERED that the 253 Motion to Shorten Time for Response to Interrogatories and Request for Production of Documents is granted in part and denied in part. Accordingly, the defendants shall serve copies of their responses upon counsel for the plaintiffs on or before 3/1/05. Signed by Judge Vanzetta P. McPherson on 2/24/05. (sl,) (Entered: 02/24/2005) 1.0

02/24/2005 *255 MOTION for Protective Order to Quash Plaintiffs' Post-Trial Consolidated Discovery Requests, or, in the Alternative, to Deny Plaintiffs' Motion to Shorten Time for Response to Interrogatories and Request for Production of Documents by Continental Carbon Incorporated. (sl,) (Entered: 02/25/2005)

02/24/2005 *256 MEMORANDUM of Law in Support of 255 MOTION for Protective Order to Quash Plaintiffs' Post-Trial Consolidated Discovery Requests, or, in the Alternative, to Deny Plaintiffs' Motion to Shorten Time for Response to Interrogatories and Request for Production of

Documents filed by Continental Carbon Incorporated.(sl,) (Entered: 02/25/2005)

02/24/2005 *258 MEMORANDUM of Law in Support of 257 MOTION for Protective Order to Quash Plaintiffs' Post-Trial Consolidated Discovery Requests, or in the Alternative, to Deny Plaintiffs' Motion to Shorten Time for Response to Interrogatories and Request for Production of Documents filed by China Synthetic Rubber Corporation. (sl,) (Entered: 02/25/2005)

02/25/2005 *MOTIONS REFERRED 255 MOTION for Protective Order, 257 MOTION for Protective Order REFERRED to Judge McPherson. (sl,) (Entered: 02/25/2005)

03/01/2005 *259 RESPONSES (Objection) to plaintiffs' First Post-Trial Consolidated Discovery Requests by Continental Carbon Incorporated. (sl,) (Entered: 03/02/2005)

03/01/2005 *260 RESPONSES (Objection) to plaintiffs' First Post-Trial Consolidated Discovery Requests by China Synthetic Rubber Corporation. (sl,) (Entered: 03/02/2005)

03/28/2005 *270 ORDERED that the 253 First MOTION To Shorten Time requesting an order that the defendant be required to respond to the post-judgment interrogatories and request for production by the end of February 2005 is denied as moot as further set out. Signed by Judge Vanzetta P. McPherson on 3/28/05. (sl,) (Entered: 03/28/2005) .50

03/28/2005 *271 ORDERED that (1) the 255 Motion for Protective Order is denied as moot; (2) the 255 Motion to deny the motion to shorten time is denied. The court has entered an order denying the motion to shorten time as moot. Signed by Judge Vanzetta P. McPherson on 3/28/05. .50

(sl,) (Entered: 03/28/2005)

03/28/2005 *272 ORDERED that (1) the 257 Motion for Protective Order is denied as moot; (2) the 257 Motion to deny the motion to shorten time is denied. The court has entered an order denying the motion to shorten time as moot. Signed by Judge Vanzetta P. McPherson on 3/28/05. (sl,) (Entered: 03/28/2005)

04/04/2005 *273 First MOTION to Compel Post Trial Discovery by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc., John Tharpe. (Attachments: # 1 # 2)(Friedman, Jeffrey) (Entered: 04/04/2005)

04/05/2005 * MOTIONS 273 First MOTION to Compel Post Trial Discovery REFERRED to Judge McPherson. (sl,) (Entered: 04/05/2005)

04/05/2005 *274 ORDERED as follows: (1) on or before 4/11/05, the plaintiff shall file a Notice in response to this order as further set out; (2) on or before 4/12/05, the defendants shall file with the Clerk of the court a response to the 273 MOTION to Compel Discovery. Defendants are specifically directed to file separate responses and to number their responses parallel to the discovery requests; (3) the court shall conduct ORAL ARGUMENT on the 273 motion on 4/14/05 at 2:00 p.m. in Courtroom 5A, Frank M. Johnson, Jr United States Courthouse Complex, One Church Street, Montgomery, AL. Counsel for the parties shall appear at the argument. Signed by Judge Vanzetta P. McPherson on 4/5/05. (sl,) (Entered: 04/05/2005) 1.00

04/11/2005 *276 NOTICE by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc., John Tharpe re 274 Order,,, Set Deadlines/Hearings,, In Response to Magistrates Discovery Order (Attachments: # 1 # 2)(Friedman, Jeffrey) (Entered: 04/11/2005)

04/12/2005 *278 RESPONSE to 273 First MOTION to Compel Discovery Response filed by Continental Carbon Incorporated, China Synthetic Rubber Corporation. (sl,) (Entered: 04/13/2005)

04/13/2005 *279 ORDERED that the oral arguments set for 4/14/05 at 2:00 p.m. before Judge Vanzetta Penn McPherson is continued generally until further orders of the court. Signed by Judge Vanzetta P. McPherson on 4/13/05. (sl,) (Entered: 04/13/2005) .50

04/15/2005 *280 ORDERED as follows: (1) Oral argument on the 273 MOTION to Compel is RESET from 4/14/05 to 4/22/05 at 11:00 a.m. in Courtroom 5A, Frank M. Johnson, Jr. United States Courthouse Complex, One Church Street, Montgomery, AL; (2) the Clerk is directed to provide a court reporter for this proceeding. Signed by Judge Vanzetta P. McPherson on 4/15/05. (sl,) (Entered: 04/15/2005) .50

04/21/2005 *282 RESPONSE in Opposition re 275 MOTION for Order re Injunctive Relief filed by All Plaintiffs. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7# 8 Exhibit 8# 9 Exhibit 9# 10 Exhibit 10)(Byrne, David) (Entered: 04/21/2005)

04/22/2005 *284 Minute Entry for proceedings held before Judge Vanzetta P. McPherson: Oral Argument on Post Trial M/to Compel held on 4/22/2005. (Recording Time 11:05 a.m.-12:07 p.m..) (sl,) (Entered: 04/22/2005)

5/17/2005 *288 ORDERED that the 273 Motion to Compel Post Trial Discovery is GRANTED in part and DENIED in part as further set out in order. The defendants shall produce Wu and Lee for depositions at a mutually convenient time and location. Subject to extenuating circumstances, such as illness, Wu's deposition shall take 2.00

place within the United States. Signed by Judge Vanzetta P. McPherson on 5/17/05. (sl,) (Entered: 05/17/2005)

Dep. 2.00

Ct Rpt. 2.00

07/01/2005 *293 BRIEF/MEMORANDUM in Support OF PLAINTIFFS' MOTION TO SUPPLEMENT THE TRIAL COURT RECORD WITH EVIDENCE WRONGFULLY WITHHELD BY DEFENDANTS FROM PRETRIAL DISCOVERY filed by All Plaintiffs. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit J# 11 Exhibit K# 12 Exhibit L# 13 Exhibit M # 14 Exhibit N# 15 Exhibit O# 16 Exhibit P# 17 Exhibit Q# 18 Exhibit R# 19 Exhibit S# 20 Exhibit T# 21 Exhibit U# 22 Exhibit V# 23 Exhibit W# 24 Exhibit X # 25 Exhibit Y)(Byrne, David) Modified on 7/5/2005 to create relation to motion filed 7/1/05 contained within this pleading (qc/djy,). (Entered: 07/01/2005)

07/01/2005 * MOTION to supplement the trial court record with evidence wrongfully withheld by defendants from pretrial discovery by All Plaintiffs (NO PDF document attached to this notice-See Docket Entry 293). (djy,) (Entered: 07/05/2005)

07/06/2005 *297 ORDERED as follows: (1) on or before 7/15/05, plaintiffs must file a memorandum or brief citing the specific legal authority for the relief requested in their 293 Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld by Defendants from Pretrial Discovery; (2) on or before 7/25/05, defendants must show cause why the 293 Motion should not be granted; (3) on or before 7/29/05, plaintiffs may file a reply 1.50

brief; (4) plaintiffs' 293 Motion is set for a hearing on 8/8/2005 at 9:00 AM in Courtroom 2A of the United States District Courthouse in Montgomery, AL; (5) Anthony Ching and Juan D. Rodriguez are ORDERED to be present for the 8/8/05 hearing in Montgomery, AL. Signed by Judge Mark E. Fuller on 7/6/05. (sl,) (Entered: 07/06/2005)

07/13/2005 *298 ORDER continuing Hearing on MOTION to supplement the trial court record with evidence wrongfully withheld by defendants from pretrial discovery: Motion Hearing reset from 8/8/2005 @ 9:00 am to 8/18/2005 10:00 AM in Courtroom 2A before Hon. Chief Judge Mark E. Fuller, USC, Montgomery, AL.. Signed by Judge Mark E. Fuller on 7/13/05. Furnished to YG, HC & KG.(djy,) (Entered: 07/13/2005) 1.00

07/15/2005 *299 BRIEF/MEMORANDUM in Support re 293 MOTION TO SUPPLEMENT THE TRIAL COURT RECORD WITH EVIDENCE WRONGFULLY WITHHELD BY DEFENDANTS FROM PRETRIAL DISCOVERY filed by All Plaintiffs. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7# 8 Exhibit 8# 9 Exhibit 9# 10 Exhibit 10# 11 Exhibit 11# 12 Exhibit 12# 13 Exhibit 13# 14 Exhibit 14# 15 Exhibit 15# 16 Exhibit 16# 17 Exhibit 17# 18 Exhibit 18 # 19 Exhibit 19)(Byrne, David) (Entered: 07/15/2005)

07/21/2005 *300 MOTION to Modify re 297 Order Setting Hearing on Motion, Set Deadlines by Continental Carbon Incorporated, China Synthetic Rubber Corporation. (vmc,) (Entered: 07/22/2005)

07/22/2005 *301 ORDER granting 300 MOTION to Modify Scheduling Order; Defendants' Response to Motion due by 8/1/2005 for MOTION to supplement the trial court 1.00

record; plaintiff may file a response on or before 8/8/2005. Signed by Judge Mark E. Fuller on 7/22/2005. (cc,) (Entered: 07/22/2005)

08/01/2005 *302 RESPONSE in Opposition to plaintiffs' 268 MOTION to Supplement the Trial Record filed by Continental Carbon Incorporated, China Synthetic Rubber Corporation. (sl,) (Entered: 08/02/2005)

8/18/2005 *304 Minute Entry for proceedings held before Judge Mark E. Fuller: Motion Hearing held on 8/18/2005 re MOTION to supplement the trial court record with evidence wrongfully withheld by defendants from pretrial discovery filed by All Plaintiffs,. (Court Reporter James R. Dickens.) (kcg,) (Entered: 08/18/2005) 5.50

Dep. 5.50

CtRpt. 5.50

08/18/2005 *305 Minute Entry for proceedings held before Judge Mark E. Fuller: In Camera Hearing held and maintained UNDER SEAL on 8/18/2005. [Minutes, Exhibits and Witness List maintained with court file in SEAL ENVELOPE] (No PDF Attached) (Court Reporter James R. Dickens.) (kcg,) (Entered: 08/18/2005)

08/19/2005 *306 ORDER denying 293 Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld by defendants from Pretrial Discovery to the extent that it seeks any relief other than an award of monetary sanctions. To the extent that plaintiffs' Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld by defendants from Pretrial Discovery seeks an award of monetary sanctions, this matter is referred to Magistrate Judge McPherson for a ruling on this matter as it is in essence a ruling relating 3.00

to discovery. The parties are advised that Magistrate Judge McPherson may or may not wish them to provide further written argument or to appear at another hearing on the matter but will leave such matters within her sound discretion. Signed by Judge Mark E. Fuller on 8/19/05. (sl,) (Entered: 08/19/2005)

09/09/2005 *307 ORDERED as follows: (1) on or before 9/16/05, the plaintiff are directed to file a supplemental motion for sanctions pursuant to Rule 37 of the FRCP, which shall include, but shall not be limited to, (a) a request for a definite sum; (b) an itemization of the attorney fees incurred in making the motion; and (c) an itemization of the reasonable expenses incurred in making the motion; (2) on or before 9/30/05, the defendants shall file their response to the motion for monetary sanctions and their brief in support of their response. Signed by Judge Vanzetta P. McPherson on 9/9/05. (sl,) (Entered: 09/09/2005) 2.00

09/16/2005 *308 Supplemental MOTION for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005 by All Plaintiffs. (Attachments: # 1 Exhibit A-1# 2 Exhibit A-2# 3 Exhibit A-3)(Friedman, Jeffrey) (Entered: 09/16/2005)

09/16/2005 * TRANSCRIPT of Oral Argument on Motion to Supplement Trial Court Record and For Sanctions held on 8/18/05 before Judge Mark E. Fuller. Court Reporter: James R. Dickens. (sl,) (Entered: 09/19/2005)

09/30/2005 *313 ORDER setting Status Conference for 10/3/2005 at 11:00 AM by conference call arranged by counsel for the plaintiff. Signed by Judge Mark E. Fuller on 9/30/05. (sl,) (Entered: 09/30/2005) 1.00

09/30/2005 *314 BRIEF/MEMORANDUM in Opposition To Plaintiffs 308 Supplemental Motion for Sanctions filed

by All Defendants. (Fruin, Peter) (Entered: 09/30/2005)

10/03/2005 * Minute Entry for proceedings held before Judge Mark E. Fuller: Telephone Status Conference held on 10/3/2005. (no pdf is attached) (kcg,) (Entered: 11/09/2005) 1.00

10/06/2005 *316 ORDER that on or before 21 October 2005, the plaintiff shall file with the Clerk of the court 19 individualized analytical charts, labeled Chart A through Chart S, to coincide with Exhibits A through S, appended to the Motion To Supplement The Trial Court Record (293-1), as set out; that on or before 4 November 2005, the defendants shall file with the Clerk of the court a Notice Regarding Withheld Documents, as set out; that a Motion Hearing is set for 11/10/2005 09:00 AM in Courtroom 5A before Honorable Vanzetta P. McPherson on Motion for Sanctions. Signed by Judge Vanzetta P. McPherson on 10/6/2005. (cc,) (Entered: 10/06/2005) 1.00

10/24/2005 *317 Response to Order 316re 293 BRIEF/MEMORANDUM in Support,, Plaintiffs' Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld By Defendants from Pretrial Discovery by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc., John Tharpe. (Attachments: # 1 Supplement Chart A# 2 Supplement Chart B# 3 Supplement Chart C# 4 Supplement Chart D# 5 Supplement Chart E# 6 Supplement Chart F# 7 Supplement Chart G# 8 Supplement Chart H# 9 Supplement Chart I# 10 Supplement Chart J# 11 Supplement Chart K# 12 Supplement Chart L# 13 Supplement Chart M # 14 Supplement Chart N# 15 Supplement Chart O# 16 Supplement Chart P# 17 Supplement Chart Q# 18 Exhibit Chart R# 19 Supplement Chart S)(Byrne, David) Modified on 10/24/2005 to create a docket relationship to 316 Order(sl,). (Entered:

10/24/2005)

11/04/2005 *318 Evidentiary Submission in Compliance with This Court's Order of October 6, 2005 filed by Continental Carbon Incorporated. (Brady, Clifford) (Entered: 11/04/2005)

11/10/2005 *319 Minute Entry for proceedings held before Judge Vanzetta P. McPherson: Motion Hearing held on 11/10/2005 re 308 Supplemental MOTION for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005 filed by All Plaintiffs. (Court Reporter Risa Entrekin.) (Attachments: # 1 Exhibit List) (war) (Entered: 11/14/2005) 2.50

Dep. 2.50

CtRpt 2.50

11/10/2005 * NOTICE of Correction: Exhibit List attached to Minutes of Motion for Sanctions Hearing held on 11/10/05 was inadvertently listed as Defendants' Exhibit List; Document should indicate Plaintiff's Exhibit List (NO PDF ATTACHED) (war) (Entered: 11/21/2005)

11/21/2005 *320 RESPONSE to Motion re 308 Supplemental MOTION for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005, MOTION to supplement the trial court record with evidence wrongfully withheld by defendants from pretrial discovery filed by All Defendants. (Brady, Clifford) (Entered: 11/21/2005)

11/22/2005 *321 MOTION for Extension of Time to File Response/Reply by All Plaintiffs. (Friedman, Jeffrey) (Entered: 11/22/2005)

11/22/2005 *322 Response to Order Plaintiffs'

Supplemental Submission Pursuant to Magistrate Judge McPherson's Instruction of November 10, 2005 by All Plaintiffs. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(Friedman, Jeffrey) (Entered: 11/22/2005)

01/31/2006 * MOTIONS 308 Supplemental MOTION for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005, 321 MOTION for Extension of Time to File Response/Reply REFERRED to Judge Judge McPherson. (sl,) (Entered: 01/31/2006)

02/07/2006 *324 ORDER granting plaintiffs' 321 Motion to File Response out of Time. Signed by Judge Vanzetta P. McPherson on 2/7/06. (sl,)11 (Entered: 02/07/2006) .50

04/04/2006 * TRANSCRIPT filed of Discovery Hearing held 8/6/04 before Judge Vanzetta McPherson, re 06-11311-D, 326 Notice of Appeal, 325 Notice of Appeal Court Reporter: James Dickens. (ydw,) (Entered: 04/05/2006)

10/11/2006 *345 [VACATED PURSUANT TO 347 ORDER FILED 11/28/06] ORDER denying 308 Motion for Sanctions as further set out in order. Signed by Judge Vanzetta P. McPherson on 10/11/06. (sl,) Modified on 11/28/2006 (sl,). (Entered: 10/11/2006)

10/20/2006 *346 Objection to re 345 Order on Motion for Sanctions and Motion to Reconsider filed by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc., John Tharpe. (Byrne, David) (Entered: 10/20/2006)

10/20/2006 * MOTION to Reconsider re 345 Order. (This document has no pdf attached. See 346 for pdf.) (sl,) (Entered: 10/23/2006)

11/28/2006 *347 ORDERED as follows: (1) the 345 Order filed 10/11/06 is VACATED; (2) all issues relating to the appropriateness of monetary sanctions against defendants raised by plaintiffs' 293 308 and [308-1] motions and all 2.00

submissions in support of plaintiffs' request for monetary sactions as a penalty for alleged discovery violations are hereby referred to United States Magistrate Judge Wallace Capel, Jr. Signed by Judge Mark E. Fuller on 11/28/06. (sl,) (Entered: 11/28/2006)

11/28/2006 * * *Reopen Document 308 Supplemental MOTION for Sanctions (PURSUANT TO 347 ORDER) (sl,) (Entered: 11/28/2006)

11/28/2006 *MOTIONS 308 Supplemental MOTION for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005 REFERRED to Judge Judge Capel. (sl,) (Entered: 11/28/2006)

11/28/2006 *Judge Wallace Capel, Jr added to case due to the retirement of Judge Vanzetta P McPherson who is no longer assigned to case and pursuant to 347 Order. (cc,) (Entered: 11/29/2006)

12/04/2006 *348 ORDERED: (1) the parties shall be available for a telephone conference call on 1/5/07 at 10:00 a.m. to be arranged by counsel for the defendants; (2) the parties shall appear for a hearing on 1/22/07 at 10:00 a.m. in Courtroom 5A, Montgomery, AL; and the Clerk is directed to provide a court reporter for this hearing. Signed by Judge Wallace Capel Jr. on 12/4/06. (sl,) 2.00

12/04/2006 *Set Telephone Conference for 1/5/2007 at 10:00 AM before Honorable Wallace Capel Jr. pursuant to 348 Order. (sl,) (Entered: 12/04/2006)

12/05/2006 *349 TRANSCRIPT of Proceedings re: Motion Hearing (PDF available for court use only) held on November 10, 2005 before Judge Vanzetta Penn McPherson. Court Reporter: Risa L. Entrekin. (sl,) (Entered: 12/06/2006) 12/06/2006 *350 MOTION for Reconsideration re 347 Order,, Terminate Motions, Vacating Magistrate Judge's Order Denying Monetary

Sanctions by All Defendants. (Attachments: # 1 Exhibit Exhibit A-Declaration of Peter S. Fruin# 2 Exhibit Exhibit B-Transcript)(Fruin, Peter) (Entered: 12/06/2006)

12/18/2006 *351 ORDER denying 350 Motion for Reconsideration as further set out. Signed by Judge Mark E. Fuller on 12/18/2006. (cb,) (Entered: 12/18/2006) .50

01/05/2007 *352 Minute Entry for proceedings held before Judge Wallace Capel Jr.: Telephone Conference held on 1/5/2007. (Court Reporter Jimmy Dickens.) (war,) (Entered: 01/05/2007) 1.50

1.00

01/05/2007 *353 ORDERED that the hearing set for 1/22/07 is CANCELLED. The parties shall file a detailed statement of costs within five day and any objections should be filed within five days thereafter. The court will consider no other documents after that point. Signed by Judge Wallace Capel Jr. on 1/5/07. (sl,) (Entered: 01/05/2007)

01/05/2007 * * *Hearing set for 1/22/07 cancelled pursuant to 353 Order entered on 1/7/07. (sl,) (Entered: 01/05/2007)

01/12/2007 *354 Evidentiary Submission re 353 Order,, Terminate Deadlines and Hearings, Plaintiffs' Statement of Costs Related to Their Motion for Sanctions filed by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc:, John Tharpe. (Attachments: # 1 Exhibit A (Plaintiffs' Counsel Time Records)) (Byrne, David) (Entered: 01/12/2007)

01/22/2007 *356 Objection to re 354 Evidentiary Submission, and Statement of Costs filed by All Defendants. (Fruin, Peter) (Entered: 01/22/2007)

02/05/2007 *357 MOTION for Leave to File Amended Statement of Costs and to File a Response to Defendants'

Objections to Plaintiffs' Statement of Costs by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc., John Tharpe. (Attachments: # 1 Exhibit A to Motion for Leave)(Friedman, Jeffrey) (Entered: 02/05/2007)	
02/05/2007 *358 ORDER granting 357 Motion for Leave to File amended Statement of Costs and to File a Response to defendants' Objections to plaintiffs' Statement of Costs. The Clerk is directed to file Exhibit A attached to document 357 as a separate document entry in the court record. Signed by Judge Wallace Capel Jr. on 2/5/07. (sl,) (Entered: 02/05/2007)	.50
02/05/2007 *359 RESPONSE to defendants' 356 Objection to plaintiffs' Statement of Costs by Plaintiffs (pursuant to 358 Order) .(sl,) (Entered: 02/05/2007)	
07/12/07 Report and Recommendation of the Magistrate Judge	42.00
Total Judge and chambers times	100.00
Total Court Reporter time	10.50
Total Courtroom deputy time	10.50

FN1. "The property owners" include the City of Columbus, Georgia ("the City"), Action Marine, Inc. ("Action Marine"), a retail boat sales and maintenance business, John Tharpe ("Tharpe"), sole owner of Action Marine, Owen Ditchfield ("Ditchfield"), owner of a residence and rental home in the area. Ditchfield was added as a class representative, but the district court denied class certification. Ditchfield, however, remained in the case as a party plaintiff.

FN2. "Continental" includes Continental Carbon, Inc., ("CCC") and its parent corporation, China Synthetic Rubber Corporation ("CSRC"). Summary Judgment was

granted in favor of the additional defendants Taiwan Cement Corporation ("Taiwan"), Barry Nicks ("Nicks") and Todd Miller ("Miller").

FN3.**Doc. 293** is the brief in support of property owners' Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld by Defendants from Pretrial Discovery. **Doc. 293-1** refers to 19 analytical charts provided by property owners, Charts A through S, which coincide with Exhibits A through S ("the PT documents") appended to the property owners' motion to supplement the trial court record (Doc. 293-1, Doc. 317).**Doc. 308** is the property owners' Supplemental Motion for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005. **Doc 308-1** is the property owners' Time Records for matter involving property owners' requests for sanctions.

FN4. Subsequently, the district court granted summary judgment dismissing the claims of fraud, misrepresentation, deceit and strict liability, as well as the City's and Action Marine's claims for emotional distress. Remaining were the claims of negligence, wanton conduct, nuisance and trespass.

FN5. Reserved to the court was the issue of injunctive relief (*See* Doc. 226-7, 299).

FN6. Continental has expressed its intent to appeal to the Supreme Court. *See* website: http://www.wtvm.com/Global/story.asp?S=6592641.

FN7.*See* Footnotes 2 & 4.

FN8.*See Riley, et al. v. Continental Carbon, et al.*, 3:04-CV-712-MHT.

FN9.*See also* related motions: **Doc. 273** (First Motion to Compel Post Trial Discovery); **Doc. 287** (Supplemental

Evidentiary Submission (Based on Newly Discovered Evidence) In Support of Plaintiffs' (273) Motion to Compel Discovery Responses); **Doc. 293** (Brief in Support of Plaintiff Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld by Defendants from Pretrial Discovery); **Doc. 297** (Order to Supplement the Trial Court Record with Evidence Wrongfully Withheld); **Doc. 299** (Plaintiff's Brief in Support of Motion-with 19 Exhibits); **Doc. 306** (Order denying Motion to Supplement Trial Court Record); **Doc. 308** (Supplemental Motion for Monetary Sanctions).

FN10.*See supra* at note 8.

FN11. This argument is rendered moot by the 110i Circuit's affirmance of the judgment. The case, however, has not yet come to rest, and it is postured for an appeal to the Supreme Court (*See supra,* at note 6).

FN12. This argument was essentially rejected by Magistrate Judge McPherson at the hearing on November 10, 2005 (Doc. 349:4).

FN13.*But see* Continental's response to a post-judgment order of April 11, 2005, suggesting that it intended the documents produced in the state action to be effective for the federal action as well (Doc. # 278, p. 9).

FN14."A party is under a duty to supplement their responses at appropriate intervals (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed.R.Civ.P. 26(e)(1)(a).

FN15."A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the

response is in some material respect incomplete or oncorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed.R.Civ.P. 26(e)(2).

FN16. In *Rosier,* 573 F.2d at 1342, the court further stated as to the defendants failure to supplement its responses: "If Ford in good faith believed that the district court's order was not intended to compel production of this document, the appropriate remedy was to seek a ruling by the district court at that point and not a year after the trial and then only when, by chance, the plaintiff learned of it."

FN17.*See supra* at pp. 6-7.

FN18. In the same submission, Continental claims documents N and O did not exist at the time of trial, and admits that R and S were produced in redacted form (Doc. 318).

FN19.*See* Tr2:11-12.

FN20. The property owners claim that Exhibit DD-which included a spreadsheet of every single equipment malfunction that occurred during the one-month period at all of the plants, including Phenix City-could have cut through days of trial because the charts were sent directly to top officials of CSRC (Doc. 349:18).

FN21. A total of approximately 10.5 hours were devoted just to the three hearings, January 19, 2005, August 18, 2005, and November 10, 2005.

FN22. The court noted in its order of August 10, 2004, that "instead of *obliterating* the objectionable text, the defendants have apparently *omitted* the objectionable text, making it impossible to determine (1) the size of the omission, (2) the context of the omissions, or (3) the ratio between the omitted text and the full document" (Doc. 195,

p. 2, emphasis in original).

FN23. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc) the Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

FN24. It is noted that the property owners voluntarily reduced their fees and expenses for these entries in their amended statement of costs (Doc. 357).

FN25. The discovery related docket entries include: Docs. 81-83, 89, 91-92, 94, 96-98, 100-113, 117-118, 130, 132, 133, 140-143, 148-150, 163-166, 173-174, 178, 183, 189, 191-195, 230-234, 237-238, 253-260, 270-274, 278-280, 284, 287-288, 293, 297-302, 304, 306-308, 314, 316-319, 320, 322, 345-348, 350-353.

M.D.Ala.,2007.
Action Marine, Inc. v. Continental Carbon, Inc.
--- F.R.D. ----, 2007 WL 2301897 (M.D.Ala.)